

(24,552)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS, PLAINTIFF IN
ERROR,

vs.

S. MIMS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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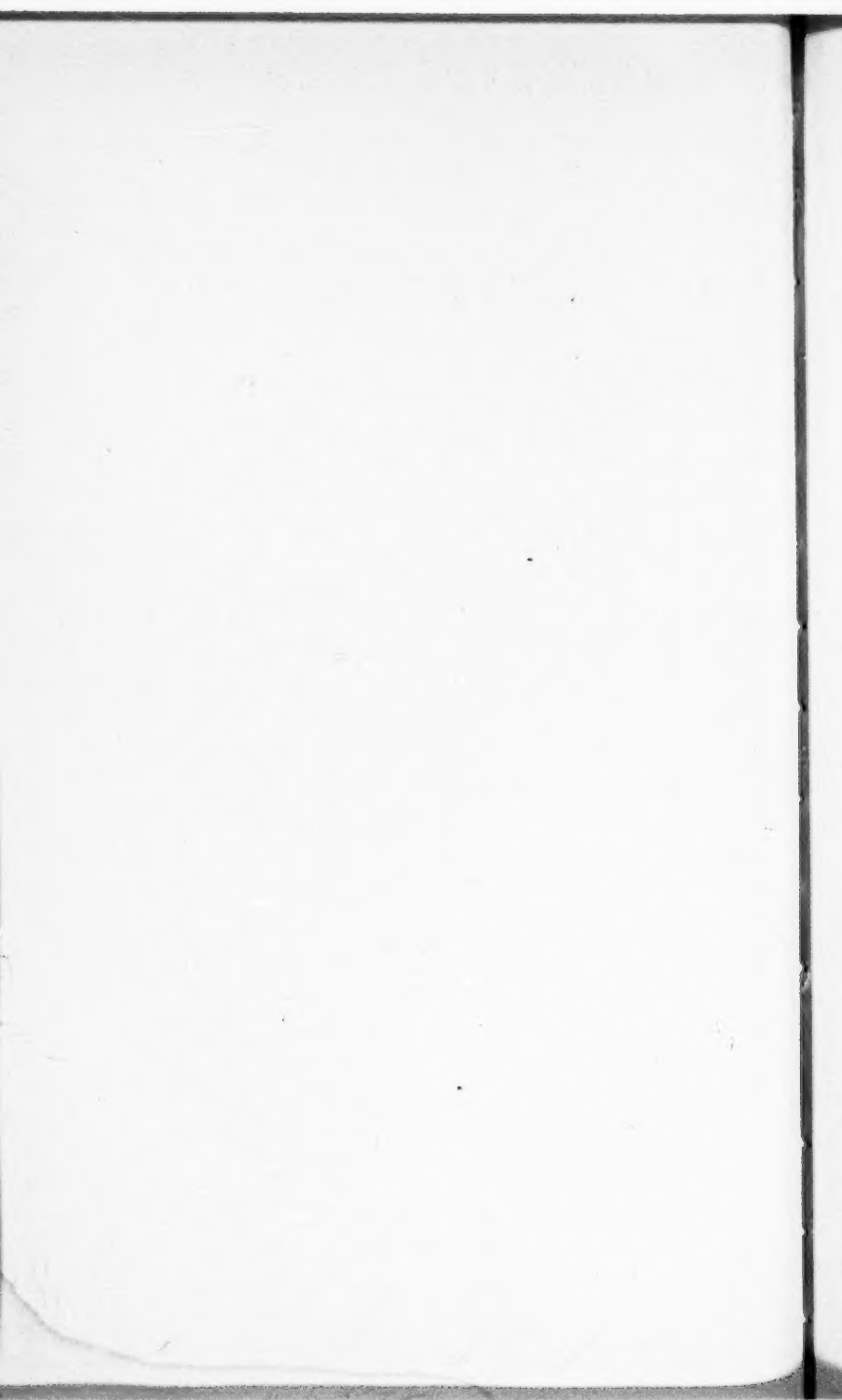
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1 THE STATE OF TEXAS,
County of Dallas:

Caption.

At a term of the District Court, 44th Judicial District of Texas, begun and holden at Dallas, within and for the County of Dallas, before the Honorable E. B. Muse, and ending on the 5th day of April, A. D. 1913, the following cause came on for trial, to-wit:

In the District Court for the 44th Judicial District of Texas, in and for Dallas County.

No. 9290-B.

S. MIMS, Plaintiff,
versus

SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant.

THE STATE OF TEXAS,
County of Dallas:

Original Petition.

To the Honorable Judge of said Court:

S. Mims, residing at Thurber, Erath County, Texas, comes now and as plaintiff complains of the defendant, Supreme Lodge, Knights of Pythias, a corporation duly incorporated under the laws of a State other than the State of Texas, but having local agents in Dallas, Tarrant and Travis Counties, namely, ——— in Dallas County, I. Carb in Tarrant County, and the Honorable B. L. Gill in Travis County, the latter being Commissioner of Banking and Insurance of the State of Texas, and for cause of action plaintiff represents as follows:

1. That the defendant is now, and has been continuously since prior to April 11, 1879, engaged in the business of life insurance, issuing policies of insurance upon the lives of persons. That
2 on to-wit, April 11, 1879, plaintiff obtained from defendant a written policy of insurance, or benefit certificate, insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named. That afterward, on to-wit, May 29, 1885, defendant issued to plaintiff, in lieu of said former insurance policy, a bigger written policy of insurance, or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of Three Thousand Dollars (\$3000.00) upon notice and proof of plaintiff's death and good standing at the time of his death in what was denominated and known as the "Endowment Rank" of the defendant, said benefit certificate further stipulating and providing that if, at

plaintiff's death, one monthly payment to the Endowment Fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his said \$3000.00), that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said Endowment Fund by each member holding an equal amount of endowment. That said last mentioned policy of insurance, as well as the prior one or ones in lieu of which same was issued, was executed and issued by the defendant under its then name of "Supreme Lodge, Knights of Pythias of the World," whereas, since the day and date of, to-wit, June 29, 1894, the name of the defendant has been and now is "Supreme Lodge, Knights of Pythias."

- 3 That at all times since said day and date of to-wit, April 11, 1897, plaintiff was an insured member as aforesaid of defendant company, and in good standing in said "Endowment Rank", and continuously maintained his insurance with the defendant, and desired and expected to continue to do so. That on to-wit, August 2, 1910, the defendant, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally passed, and threatened to promulgate, certain pretended laws, or amended laws, the exact nature and substance of which are not known to plaintiff but well known to defendant, wherein and whereby defendant demanded and required of plaintiff that he should, beginning with the month of January 1911, pay defendant the large sum of to-wit, \$34.80 monthly dues and assessments as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only to-wit, \$7.35 dues and assessments as a condition to the recognition and maintenance of said insurance. That thereafter, and on to-wit, October 11, 1910, the defendant, following up its wrongful conduct as aforesaid, did issue and deliver to plaintiff its notice of the passage and promulgation of said pretended or amended laws as aforesaid, and did, in said written notice, as well as orally, and in divers ways through its agents, notify and give plaintiff to understand that beginning with the month of January, 1911, the defendant would exact of plaintiff the payment of said \$34.80 dues and assessments as aforesaid, as necessary to be paid by plaintiff to keep up his insurance policy as aforesaid. That during the month of January 1911, and prior to any default by plaintiff in payment to defendant of any sums
- 4 whatsoever, plaintiff besought defendant to continue his said insurance policy upon payment as theretofore to it of simply the amount of \$7.35 per month dues and assessments, and then and there, on to-wit, January 20, 1911, tendered to defendant the full sum of \$22.05 as dues and assessments at the rate of \$7.35 per month for the three months of January, February and March, 1911, which tender was then and there by defendant refused over plaintiff's protest, and plaintiff then and there given further notice by defendant that it, defendant, would not continue in force plaintiff's

said insurance policy unless plaintiff should, beginning with the month of January, 1911, pay to defendant said large sum of to-wit, \$34.80 monthly as dues and assessments. That plaintiff then and there declined and refused to pay defendant said large amount, and then and there accepted defendant's conduct aforesaid as a breach of plaintiff's contract of insurance with defendant; and plaintiff now gives defendant further notice that he accepts defendant's said conduct as a wrongful breach of his said insurance contract.

2. That from and since said day and date of April 11, 1879, plaintiff has paid to the defendant, under said insurance policies, at various and sundry times, a large amount of assessments and dues exacted by defendant as a condition for the maintenance of said policies. That such payments were made, perhaps monthly, or it may be at various times quarterly or even at more irregular intervals. The dates or times of such payments, or the amounts thereof are not known to plaintiff, but are well and fully known to defendant, but according to plaintiff's best information and belief,

5 and on such information and belief he alleges the fact to be that from and since the day and date of April 11, 1879, plaintiff paid, as dues and assessments under said policies, the large sum of to-wit, Nineteen Hundred Fifty Dollars (\$1950.00); and plaintiff is entitled to his recovery against defendant for the full amount of the principal of all such payments, together with lawful and legal interest on each payment from the respective date thereof. That all such payments and contributions at any time made to the defendant by plaintiff under or upon said policies, contributed and assisted to create a specifically designated fund of the defendant, belonging to its said "Endowment Rank", the particular designation of which fund is not known to plaintiff but well known to defendant. That by whatsoever name said fund may now be known or designated, defendant has on hand and in its possession amounts of money in said fund amounting to the large sum of to-wit, Four Hundred Thousand Dollars (\$400,000.00), from which plaintiff is entitled to repayment of all sums so paid by him to defendant, and to repayment of any judgment to be obtained herein against defendant, with his lien for such judgment against said fund.

That on the day and date defendant so wrongfully breached said contract, to-wit, February 1, 1911, plaintiff was of the age of seventy-four (74) years and uninsurable by other insurance companies, and would have been and was unable to obtain insurance upon his life in another company in lieu of the contract of insurance so breached by defendant. That at the date of said breach plaintiff had an expectancy of five years' of life, according to the approved mortality tables. That on said date, to-wit, February 1, 1911, it was

6 the lawful obligation and duty of defendant to have maintained and carried plaintiff's said policy of insurance up to plaintiff's death, for the amount of to-wit, One Dollar per month. That at such date, to-wit, the breach of said contract, the then present value of such payments as defendant would lawfully have been able to have exacted of plaintiff for the maintenance of said policy of insurance up to plaintiff's death was, to-wit, Fifty Dollars (\$50.00);

and the then present value of the Three Thousand Dollars contracted to be paid by defendant to plaintiff by the terms of said insurance policy was, to-wit, Two Thousand Dollars. That by reason of the premises the value at the time of said breach of plaintiff's said insurance policy was the sum of Nineteen Hundred Fifty Dollars, and such was the value of said policy at said time in any event, whatever be the method of arriving at and determining said value at said time.

Defendant is given notice to produce, upon the trial hereof, its Constitution, Laws and By-Laws in force on April 11, 1879; its Laws or Amended Laws, pretended to have been passed in August 1910; all insurance policies or benefit certificates at any time issued to plaintiff prior to the one of date May 29, 1885; all letters and communications at any time whatsoever written by plaintiff, or any one in his behalf, to defendant, or any of its officials or agents, including its agent, I. Carb of Fort Worth, and its agent, John T. Bonner of Tyler, Texas; and including any and all letters at any time written by plaintiff, or any one for him, to any of the agents, subordinates or officials of the defendant; also all records and data of the defendant in any manner showing the dates and amounts
7 of payments to it, or to any of its subordinates or agents, by the plaintiff.

Wherefore plaintiff prays that defendant be cited by service, either upon its local agent, ——— in Dallas County, Texas, its local agent, I. Carb, of Tarrant County, Texas, or upon the Honorable B. L. Gill, Commissioner of Banking and Insurance of the State of Texas, and that upon trial hereof plaintiff have judgment against defendant for the amount of any and all dues, assessments, or other sums paid to the defendant, or any of its subsidiary lodges, under or upon said contract of insurance aforesaid, with interest upon each such payment from its respective date, or for the value of plaintiff's policy at the time of its breach by defendant as aforesaid, with interest thereon as allowed by law; for judgment directing the payment to plaintiff by defendant, out of its fund hereinbefore referred to, or any other fund or funds of defendant into which, upon the trial hereof, the payments to defendant by plaintiff as aforesaid may be shown to have been made, of any judgment obtained herein, and for lien upon said fund, with foreclosure thereof, to the amount of such judgment; and plaintiff prays for costs of suit, general special, legal and equitable relief; and as in duty bound will ever pray.

THOS. F. WEST,
L. C. McBRIDE,
Attorneys for Plaintiff.

Filed May 19, 1911, H. H. Williams, Clerk District Courts by S. T. Jackson Deputy.

8 In the District Court, Dallas County, 44th Judicial District.

THE STATE OF TEXAS,
County of Dallas:

Plaintiff's First Amended Petition.

To the Honorable E. B. Muse, Judge of said Court:

By leave of Court, plaintiff S. Mims, files this his first amended petition, in lieu of his original petition filed May 19, 1911, and for such amendment says:

The plaintiff S. Mims, residing in Erath County, Texas, comes now and complains of the defendant, Supreme Lodge Knights of Pythias, a corporation duly incorporated under the laws enacted by the Congress of the United States, but transacting business in the State of Texas, and having local agents in Dallas County, Texas, and also having an agent for service in Travis County, Texas, upon whom service herein may be had, namely, the Honorable B. L. Gill, Commissioner of Banking and Insurance, of the State of Texas, and for cause of action plaintiff represents as follows, to-wit:

1.

That in the year 1870, there was incorporated under a general law enacted by the Congress of the United States, a certain insurance order or company, the "Supreme Lodge Knights of Pythias," otherwise known and frequently denominated thereafter as "Supreme Lodge Knights of Pythias of the World." That by the express terms of the general law of the Congress under which said corporation was incorporated, the life of said corporation expired in the year 1890. That said Company continued after its incorporation down to the time of its death by law, or expiration of its charter in said year 1890, to engage in the business of life insurance issuing policies of insurance upon the lives of persons; that on to-wit; April 11, 1879, plaintiff obtained from said company a written policy of insurance or benefit certificate insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named; that afterwards, on, to-wit: May 29, 1885, said corporation so issuing said policy issued and delivered to plaintiff in lieu of said former insurance policy another written policy of insurance or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of Three Thousand (\$3,000.00) upon notice and proof of plaintiff's death and good standing at the time of his death in what was denominated and known as the "Endowment Rank" of said corporation, said benefit certificate further stipulating and providing that if, at plaintiff's death, one monthly payment to the Endowment Fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his \$3,000.00),

that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said Endowment Fund by each member holding an equal amount of endowment. That plaintiff continued carrying his said policies with said company until the expiration of its existence by terms of law, as aforesaid, whereupon the officials in charge of the affairs of said company at its decease, and their successors, continued there-

- 10 after for a period of several years, and until the incorporation of the defendant herein in the year 1894 to take and acquire and remain in possession of the assets of said deceased company, and to continue and carry on as formerly, its business as an unincorporated association, but still under the name "Supreme Lodge Knights of Pythias," or "Supreme Lodge Knights of Pythias of the World." That thereupon, and thereupon, and thereafter, and in the year 1894, the defendant herein, the "Supreme Lodge Knights of Pythias" was incorporated under a special act of the Congress of the United States, since which time said defendant has continued to be, and is now a corporation duly incorporated and engaged in the business of life insurance, issuing policies of insurance upon the lives of persons: that by the express terms and conditions of the charter of the defendant company it was provided and stipulated that "all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in section one of this act, shall survive and succeed to and against the body, corporate and politic, hereby created," whereby it was expressly stipulated and provided that the defendant in accepting its charter should undertake and obligate itself to in all respect- carry out the terms of all insurance policies of said former corporation aforesaid, or of said unincorporated association aforesaid. Furthermore, plaintiff avers, and shows the fact to be, that the defendant at all times since its incorporation, has accepted dues, payments and premiums from the plaintiff, and in all respects bound itself in law and in fact, to carry out plaintiff's said
- 11 contracts of insurance. That the defendant acquired and took over all the assets of said former corporation and of said unincorporated association.

That at all times plaintiff was and remained a member in good standing, of the Endowment Rank of said corporation which issues said policies, and in all respects continued and remained in good standing in both of the corporations and the unincorporated association mentioned herein, and continued at all times to carry and comply with all the terms and conditions of this insurance aforesaid, and desired and expected to continue to do so, notwithstanding which fact the defendant herein, and while plaintiff's said insurance was in full force and effect, did on or about August 2nd, 1910, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally pass and promulgate and put into force, certain pretended laws or amended laws, wherein and whereby the defendant demanded and required of plaintiff that plaintiff should, beginning with the month of January, 1911, pay the defendant

the large sum of \$34.80, monthly dues and assessments, as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only \$7.35 dues and assessments, per month as a condition precedent to the recognition and maintenance of said policies, and certainly was not authorized in law to exact more than said last mentioned sum, and not even that amount,

12 as it was a part and condition of plaintiff's contracts of insurance as aforesaid, that the monthly rate of assessment to be paid by plaintiff should never at any time exceed the amount of, to-wit, \$3.60 per month, by virtue of the fact that there was established in the year 1884 what was known and denominated as the fourth class of the Endowment Rank of said first incorporated company, as aforesaid, and it was expressly provided by the constitution or by-laws of said company, which provisions became and were a part of plaintiff's contracts of insurance aforesaid, that the Endowment Rank, for the payment of benefits in said fourth class, should be derived from monthly payments by each member (of which plaintiff was one), said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application (meaning his application for membership in said Endowment Rank) and his expectancy of life, the age to be taken at the nearest anniversary of his birthday; that the monthly payments should be based upon the average expectancy of life of the applicant, and should continue the same so long as his membership continued, by reason whereof the monthly assessment rate to be paid by plaintiff upon his said \$3,000.00 of insurance was expressly limited and agreed never to exceed said sum of to-wit, \$3.60 per month.

That defendant not only passed and demanded, as aforesaid, in the year 1910, an illegal raise in rates against plaintiff, as aforesaid, but it further then and there breached plaintiff's contracts with it, as aforesaid, in that, in passing said laws or pretended laws, it expressly declared and announced that the Supreme Lodge

13 of the defendant should have the right to change, increase or adjust the schedule of rates in the fourth class of defendant (in which plaintiff with his insurance aforesaid was), and which attempt to so reserve said right in said Supreme Lodge was illegal, unauthorized, and a further breach and repudiation of plaintiff's said contracts of insurance with defendant; that not only so, but in so attempting to pass said laws of 1910, the defendant further breached its contracts of insurance with plaintiff, in that, it then and there undertook to provide and declare that members of its fourth class should have no divisible interest in the funds or properties of the insurance department of the defendant, nor be entitled to any apportionment or application of the same, which was a further breach and repudiation of plaintiff's contracts of insurance.

That after so passing said laws, on or about August, 1910, as aforesaid, the defendant following up its wrongful intentions to breach plaintiff's contracts of insurance with it, did, about, to-wit: October 1910, issue and deliver to plaintiff its notice of the passage and

promulgation of said pretended or amended laws, by giving written notice of said thereof to plaintiff, as well as oral notice by and through its agents, and in divers and sundry ways through made, perhaps monthly, or it may be at various times quarterly or even at more irregular intervals. The dates or times of such payments, or the amounts thereof are not known to plaintiff, but are well and fully known to defendant, but according to plaintiff's best information and belief, and on such information and belief, he alleges the fact to be that from and since the day and date of April 11, 1879, plaintiff paid, as dues and assessments under said policies, the large sum of, to-wit: Nineteen Hundred Fifty Dollars (\$1,950.00) and plaintiff is entitled to his recovery against defendant for the full amount of the principal of all such payments, together with lawful and legal interest on each payment from the respective date thereof. That all such payments and contributions at any time made by plaintiff under or upon said policies, contributed and assisted to create a specifically designated fund of the defendant, belonging to its said "Endowment Rank", the particular designation of which fund is not known to plaintiff but well known to defendant. That by whatever name said fund may now be known or designated, defendant has on hand and in its possession amounts of money in said fund amounting to the large sum of, to-wit: Four Hundred Thousand Dollars (\$400,000.00), from which plaintiff is entitled to repayment of all sums so paid by him to defendant, and to repayment of any judgment to be obtained herein against defendant, with his lien for such judgment against said fund.

That on the day and date defendant so wrongfully breached said contract, to-wit: February 1, 1911, plaintiff was of the age of seventy-four (74) years and uninsurable by other insurance companies, or any other insurance orders similar, or anything like similar, to the defendant company, or to the company which issued said policy, its agents and representatives, the defendant did

15 notify and give plaintiff to understand that beginning with the month of January, 1911, the defendant would enforce and put into effect said laws or amended laws, exacting of plaintiff the payment of said sum of \$34.80, monthly dues and assessments as aforesaid, as necessary to be paid by plaintiff, as a condition precedent to the defendant longer carrying out its insurance contracts with plaintiff. That during the month of January 1911, and prior to any default by plaintiff in payment to defendant of any sums whatsoever, plaintiff besought defendant to continue his said insurance policy upon payment as theretofore to it of simply the amount of \$7.35 per month dues and assessments, and then and there, on, to-wit: January 20, 1911, tendered to defendant the full sum of \$22.05 as dues and assessments at the rate of \$7.35 per month for the three months of January, February and March, 1911, which tender was then and there by defendant refused over plaintiff's protest, and plaintiff then given further notice by defendant that it, defendant, would not continue in force plaintiff's said insurance policy unless plaintiff should, beginning with the month of Jan-

uary, 1911, pay to defendant said large sum of, to-wit: \$34.80 monthly as dues and assessments. That plaintiff then and there declined and refused to pay defendant said larger amount, and then and there accepted defendant's conduct aforesaid as a breach of plaintiff's contract of insurance with defendant; and plaintiff now gives defendant further notice that he accepts defendant's said conduct as a wrongful breach of his said insurance contract.

That from and since said day and date of April 11, 1879, 16 plaintiff has paid under said insurance policies, at various and sundry times, a large amount of assessments and dues exacted as a condition for the maintenance of said policies. That such payments were at the date of said breach plaintiff had an expectancy of five years of life, according to the approved mortality tables. That on said date, to-wit: February 1, 1911, it was the lawful obligation and duty of defendant to have maintained and carried plaintiff's said policy of insurance up to plaintiff's death, for the amount of, to-wit: One Dollar per month. That at such date, to-wit: the breach of said contract the then present value of such payments as defendant would lawfully have been able to have exacted of plaintiff for the maintenance of said policy of insurance up to plaintiff's death was, to-wit: Fifty Dollars (\$50.00); and the then present value of the Three Thousand Dollars contracted to be paid by defendant to plaintiff by the terms of said insurance policy was, to-wit: Two Thousand Dollars. That by reason of the premises, the value at the time of said breach of plaintiff's said insurance policy was the sum of Nineteen Hundred Fifty Dollars, and such was the value of said policy at said time in any event whatever be the method of arriving at and determining said value at said time, provided plaintiff be not entitled to recover the premium payments, with interest as prayed for.

Defendant is given notice to produce upon the trial hereof the Constitution, Laws and By-Laws in force on April 11, 1879, and in

May 1885, of said first incorporated company; the laws or 17 amended laws, pretended to have been passed by defendant in August, 1910; all insurance policies or benefit certificates at any time issued to plaintiff prior to one of date May 29, 1885, by said first incorporated company; all letters and communications at any time whatsoever written by plaintiff, or any one in his behalf, to defendant, or to said first incorporated company or unincorporated company, or any of their officials or agents, including I. Carb of Fort Worth, and John T. Bonner of Tyler, Texas; and including any and all letters at any time written by plaintiff, or any one for him, to any of the agents, subordinates or officials of the defendant or said first incorporated company or unincorporated company; also all records and data of the defendant, or of said first incorporated company or unincorporated company, in any manner showing the dates and amounts of payments to it, or to any of its or their subordinates or agents, by the plaintiff.

Wherefore, plaintiff prays that defendant be cited by service, either upon its local agent — in Dallas County, Texas; its local agent, I. Carb, of Tarrant County, Texas; or upon the Honorable

B. L. Gill, Commissioner of Banking and Insurance of the State of Texas; and that upon trial hereof plaintiff have judgment against defendant for the amount of any and all dues, assessments, or other sums paid to the defendant, or any of its subsidiary lodges, under or upon said contracts of insurance aforesaid, with interest upon each such payment from its respective date, or for the value of plaintiff's policy at the time of its breach by defendant as aforesaid, with interest thereon as allowed by law; for judgment directing the payment to plaintiff by defendant, out of its fund hereinbefore referred to, or any other fund or funds of defendant into which, upon the trial hereof, the payments to defendant have been made, of any judgment obtained herein, and for lien upon said fund, with foreclosure thereof, to the amount of such judgment; and plaintiff prays for costs of suit, general and special, legal and equitable relief; and as in duty bound will ever pray.

L. C. McBRIDE,
THOS. F. WEST,
Attorneys for Plaintiff.

Filed February 14, 1913, H. H. Williams, Dist. Clerk, Dallas County, Texas. By S. T. Jackson Deputy.

No. 9290-B.

S. MIMS,

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Suit Pending in the District Court of Dallas County, Texas.

Bond for Costs.

Know all men by these Presents, that we, S. Mims, as principal, and—as sureties, bind ourselves, jointly and severally, to pay unto the officers of said Court all costs that may have accrued or may accrue in the prosecution of a certain suit now pending in said Court, wherein S. Mims is Plaintiff and Supreme Lodge Knights of Pythias is Defendant.

Witness our hands this 10th day of March, 1913.

S. MIMS,

By L. C. McBRIDE, *Attorney;*

Principal, P. O. Address, Thurber, Texas.

L. C. McBRIDE, *Surety;*
P. O. Address, Dallas, Texas.

EDWARD GRAY, *Surety;*
P. O. Address, Dallas, Texas.

19 Approved, this 11th day of March, A. D. 1913. H. H. Williams, Clerk Dist. Court, Dallas Co. Tex. Per S. T. Jackson Deputy. Filed March 11, 1913, H. H. Williams, Clerk, By S. T. Jackson Deputy.

In the District Court of Dallas County, Texas, for the Fourteenth Judicial District.

No. 9290-B.

S. MIMS
vs.
KNIGHTS OF PYTHIAS.

Defendant's Original Answer.

Now at this time, comes the defendant in the above styled and numbered cause, and denies all and singular the allegations in plaintiff's petition, and demands strict proof of same.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Filed May 26, 1911. H. H. Williams, Clerk District Court.
By B. M. Bond Deputy.

In District Court, Dallas County, Texas, 44th Judicial District.

No. 9290-B.

S. MIMS,
vs.
SUPREME LODGE, KNIGHTS OF PYTHIAS

Defendant's 1st Amended Original Answer.

Now at this time comes the defendant and by leave of the court first had and obtained, makes and filed this, its first amended original answer, amending its original answer filed herein on the 26 day of May, 1911, and for amendment to said answer and in reply to plaintiff's first amended petition filed herein on February 14th, 1913, says:

(1) Defendant excepts to plaintiff's petition and says the allegations therein contained are wholly insufficient in law and show no cause of action against this defendant, and of this the defendant prays the judgment of the court.

CRANE & CRANE AND
H. P. BROWN,
Attorneys for Defendant.

(2) And for special exceptions to said petition, the defendant excepts to all that portion of said petition claiming the amount of premiums paid under any of the certificates of insurance prior to the last certificate sued upon in this case, and claiming any damages

by reason of any of the facts alleged in plaintiff's petition in reference to the issuance of all of said prior certificates for the following reasons, to-wit:

(a) Because the measure of damages alleged would not be and is not the measure of damages under the laws of this state, the measure of damages, if any, being the value of said last named certificate sued on at the date of its cancellation or at the date of the alleged breach of contract alleged in plaintiff's petition.

(b) Because it appears from the allegations in plaintiff's petition that said prior certificates alleged to have been issued before the last certificate sued upon was issued, were cancelled by agreement between the parties, and it further appears that in lieu of said cancelled certificates, other certificates were issued, or another certificate was issued, and all rights under the said surrendered certificates or cancelled certificates were just, and in no event would plaintiff be entitled to recover in this case therefor for the premiums paid or

21 any alleged damages arising by reason of the surrender and cancellation of said certificates prior to the date of the certificate sued on in this case.

(3) And for further answer to plaintiff's petition this defendant alleges and shows to the Court that the cause of action set up in plaintiff's first amended petition against this defendant was and is barred by the statute of four years limitation prior to the commencement of this suit, for the defendant avers that any cause of action as alleged in plaintiff's first amended petition, if it ever existed at all against this defendant, accrued more than four years before the filing of said first amended petition in this case and that the same was therefore barred by the statute of limitation of four years.

(4) For further answer to said first amended petition, this defendant says that the cause and causes of action set up in plaintiff's first amended petition against this defendant, were and are barred by the statute of limitation of two years, for the defendant avers that the cause or causes of action alleged in plaintiff's first amended petition against this defendant accrued, if the same accrued at all, more than two years before the filing of said first amended petition in this case and that the same are therefore barred by the statute of limitation of two years.

(5) For further answer to said plaintiff's first amended petition, this defendant denies all and singular the allegations therein contained and demands strict proof of the same.

(6) And for further and special answer to plaintiff's first amended petition filed herein, this defendant comes and says that the plaintiff ought not to recover in this case, for the defendant alleges

22 the facts to be as follows:

That the former corporation known as The Supreme Lodge of Knights of the World and this defendant, the Supreme Lodge Knights of Pythias were each and both fraternal beneficiary associations duly incorporated under the laws of the United States; that the former corporation, the Supreme Lodge of the Knights of Pythias of the World was a fraternal beneficiary association duly in-

incorporated on or about the 5th day of August, 1870 by articles of incorporation filed in the office of the Recorder of Deeds of the District of Columbia under and by virtue of an Act of Congress of the United States, approved May 5th, 1870. That said former incorporation and the amendments thereto until the expiration of its charter by limitation on or about the 5th day of May 1890. That the present corporation, the defendant, in this case was incorporated by an act of Congress approved by the President June 29th, 1894, and that since said date this defendant has continued to act under and by virtue of said original act of incorporation acting under and by virtue of said original act of incorporation and the amendments thereto at this time.

Defendant avers that during all of said times up to the expiration of its charter as above alleged, the said corporation, the Supreme Lodge of the Knights of Pythias of the World, was a fraternal beneficiary association, and its business up to the end of the expiration of its charter had been and was carried on for the sole benefit of its members and their beneficiaries, and not for profit. That since the organization and incorporation of this
 23 defendant in the year of 1894 this defendant was and has been a fraternal beneficiary association, duly incorporated under the laws of the United States as aforesaid, and that ever since its organization and now, its business has been carried on for the sole benefit of its members and their beneficiaries, and not for profit. That both of said alleged corporations always had and the defendant has now a lodge system with ritualistic form of work and a representative form of government and made provisions for the payment of benefits in case of death of all of their respective insured members, such payment in all cases being subject to the members' compliance with the contracts made between him and the respective corporations, and the constitution, rules and laws of the respective corporations, and that the funds from which payment of such benefits have been and were to be made, and the funds from which the expenses of the respective corporations have been and are to be defrayed, were and are derived and to be derived from the beneficiary calls, assessments and dues collected from the respective members of the respective corporations.

That at no time during the life of either of said corporations has either of them issued beneficiary certificates to any person under the age of twenty one years or over fifty years of age, and that each of said corporations always provided and this defendant always had and now provides in its contracts of insurance and in its laws that death benefits will be paid only to families, blood relatives, affianced wife and persons dependent upon the members.

The defendant avers that the charter of the old corporation known as the Supreme Lodge of the Knights of Pythias of the
 24 World expired by limitation, as alleged in plaintiff's petition, in the year 1890, and that from that date up to the incorporation of this defendant, as above alleged, there was no corporation existing, but an unincorporated society known as the Supreme Lodge Knights of Pythias, or the Supreme Lodge Knights

of Pythias of the World, existing and carrying on its business under laws existing at the time of the expiration of the charter of the old corporation and under the laws adopted by said unincorporated society.

Defendant avers that in the articles of incorporation and amendments thereto of the former corporation The Supreme Lodge of Knights of Pythias of the World, and of this defendant corporation, and in the constitution and laws of both of said corporations and in the constitution and the laws of the alleged unincorporated society, express power was given and is given the supreme governing body of each of said corporations and of said unincorporated society to amend their respective laws, and the defendant is and was at all times mentioned in plaintiff's petition since the year 1894, a fraternal benefit society, incorporated under the laws aforesaid, for the purposes incident to such associations, and that its certificates of membership were issued subject to its constitution, by-laws, rules and regulations; that the same facts exist as to the corporation known as the Supreme Lodge of Knights of Pythias of the World and as to the said unincorporated society.

Defendant avers that it never entered into any contract as alleged in plaintiff's petition and sued on in this case, with said plaintiff. That as above stated, the charter of the corporation
25 known as The Supreme Lodge of the Knights of Pythias of the World, with which corporation plaintiff alleges he made the contract sued on in this case, expired in the year 1890, and it ceased to be a corporation, and any contract made with said corporation terminated and expired at the end of the expiration of its charter aforesaid.

Defendant avers that after the expiration of the charter of said alleged corporation in 1890, an unincorporated society known as the Supreme Lodge of the Knights of Pythias of the World, or Supreme Lodge of the Knights of Pythias, conducted and carried on its business under and by virtue of the laws existing at the date of the expiration of the charter of said old corporation in 1890, and under and by virtue of the laws adopted and enacted by said unincorporated society. That under and by virtue of the constitution and laws existing and under which said unincorporated society began and carried on its business, and under which said unincorporated society did conduct its business, it was expressly provided that each member of the endowment rank should pay in accordance with his age and the amount of endowment applied for or held by him, a monthly assessment as provided in the table of monthly payments set out in the constitution and laws above referred to, as long as he remained a member of the endowment rank, unless otherwise provided for by the Supreme Lodge of the Knights of Pythias or Supreme Lodge of the Knights of Pythias of the World.

That this defendant, when it became a corporation and received dues, assessments or payments from the plaintiff in
26 this case, did so upon the obligation both expressed and implied, upon the part of the plaintiff, that he would comply with its law in force, existing at and subsequent to the time this defendant

was incorporated as aforesaid. That the defendant would not have received said premiums, and had no authority to receive them upon any other basis. The plaintiff, since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws adopted by it from time to time, or with notice thereof, expressed or implied.

That frequently since this defendant became a corporation and plaintiff dealt with it as such in paying assessments upon the certificates alleged to have been issued to him and sued on in this case, defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases in his rates of assessments and paid the same, and has paid special assessments previously required by this defendant and required by the old corporation and by the unincorporated society, and that the plaintiff, by his acts, has acquiesced in and ratified by his conduct and actions the right of the defendant to so amend and change its laws as to the rates of assessments. That by such actions of the plaintiff, he waived all objections to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained of by the plaintiff, were and are binding upon the plaintiff by virtue of the implied obligation and plaintiff's acquiescence and ratification of said laws

27 passed heretofore by this defendant, and by virtue of the stipulation contained in his application for his certificate of insurance, and his certificate, and by virtue of the charter, constitution and laws of the defendant order, and by reason of the fact that plaintiff became a member of the unincorporated society and became a member of this defendant corporation and one of its subordinate lodges at times when the right to raise the rate was expressly given by the constitution and the laws of said unincorporated society, and by the constitution and laws of this defendant, and by reason of the further fact that the plaintiff became a member of one of the subordinate lodges of this defendant corporation at the time of and after this defendant was incorporated, and when the authority, right and power to change the rates and raise the existing rates of premiums was in full force under the law of this defendant corporation.

The defendant avers that the defendant's rights and any claim against this defendant by plaintiff are governed by and dependent upon its charter of incorporation, and the laws of the United States and by the decisions of the Courts of the United States, and its obligations to the plaintiff, if any, are to be governed and passed upon in accordance with the laws of the United States, its charter and its constitution and by-laws; and the defendant avers it had no authority and no power to collect premiums from plaintiff upon any other terms or conditions than those above stated.

The defendant avers that under the charter of this defendant and under its constitution and laws, it had the right to raise the existing rates of premiums upon certificates of insurance issued by it
28 or for which it might become responsible, and that the exercise of such right was and is the exercise of a right granted

to it by the Congress of the United States; for the defendant avers that by the charter and the act of incorporation of this defendant under and by virtue of the laws of the United States, express authority was given this defendant to amend its constitution and by-laws, and the exercise of such power of amendment was but the exercise of a right granted to it by the Congress of the United States and under and by virtue of the laws of the United States.

Defendant alleges that under the constitution, laws, rules and regulations of this defendant, existing at the date it became a corporation, and adopted by it and passed since its organization as a corporation, the right was and is expressly given this defendant to increase its rates of assessments, and that the rates of assessments levied at any one time by this defendant were levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the endowment rank or insurance department of this defendant, unless otherwise provided by the Supreme Lodge or Board of Control of the endowment rank or insurance department of this defendant.

That under the constitution, laws, rules and regulations existing and under which the unincorporated society acted after the expiration of the Charter in 1890 of the old corporation, the right was and is expressly given to said unincorporated society to increase the rates of assessments and that the rates of assessments levied
29 at any one time by said unincorporated society were levied as expressly stipulated in its laws, to be in force and effect so long as a member remained a member of the endowment rank or insurance department of said unincorporated society, unless otherwise provided for by its supreme governing body or board of control of the endowment rank of said unincorporated society.

In other words, defendant avers that by the charter and laws and regulations existing at the time said unincorporated society began business and under which it acted, and adopted by said unincorporated society, and under the charter, laws and regulations adopted by this defendant since its incorporation, and existing and under which this defendant acted at the date of its incorporation, the expressed right was given and retained by said unincorporated society and by this defendant, all of which was acquiesced in and ratified by the plaintiff, and which laws, rules and regulations plaintiff, when he became a member respectively of said unincorporated society and of this defendant, were binding upon plaintiff to increase the rates of assessments of any certificate issued by the defendant, or for which the defendant might become responsible for the payment of, either expressed or implied, or for which said unincorporated society might become responsible for the payment of either expressed or implied, or which was issued by said unincorporated society.

Defendant avers that under the laws existing at and before plaintiff became a member of this incorporation, and under the laws existing many years prior to the alleged breach of contract
30 set up in plaintiff's said petition, all of which laws the plaintiff had acquiesced in and ratified and accepted the right to

change, increase or adjust the schedule of rates in the fourth class referred to in plaintiff's petition, existed under the laws both of the unincorporated society and of this defendant and of the former incorporated society, the Supreme Lodge Knights of Pythias of the World.

Defendant further avers that long before the alleged breach of plaintiff's contract, as alleged in plaintiff's petition, under the laws of the unincorporated society above referred to and of this defendant and of the old corporation, the Supreme Lodge Knights of Pythias of the World, it was expressly provided in substance and effect, all of which was acquiesced in and agreed to by the plaintiff and was binding upon the plaintiff, that no member of the endowment rank should have any divisible interest or any claim whatever to any part of the surplus funds or properties of said endowment rank, or be entitled to have any portion of said funds or properties of said endowment rank applied to his certificate, and that no member of said fourth class rate of said endowment rank should have any claim whatever to any part of said funds or any divisible interest during his life time in said funds of said endowment rank.

(7) For further and special answer to plaintiff's petition, defendant denies that it ever issued or executed or became responsible for the certificate sued on in this case by the plaintiff, for the defendant alleges the facts to be as follows, to-wit:

31 That if the said certificate sued on in this case was ever issued by the Supreme Lodge of the Knights of Pythias of the World, the old corporation, as alleged by the plaintiff, which is not admitted by this defendant but expressly denied, the following are the facts with reference to the issuance of said certificate, to-wit:

That on or about May 29th, 1885 the certificate sued on in this case was issued to the plaintiff by the former corporation, the Supreme Lodge Knights of Pythias of the World or its endowment rank in lieu of any former certificate of insurance issued by said corporation or its endowment rank to the plaintiff.

Defendant avers and shows to the court that if said certificate was issued as alleged in plaintiff's petition, which is not admitted but denied, the following are the facts with reference to the issuance of the same, to-wit: That on to-wit, the 11th day of April, 1879, the plaintiff filed with the former corporation, The Supreme Lodge Knights of Pythias of the World, or its endowment rank, at Galveston, Texas, an application for insurance, which said application the defendant avers that it was approved by said corporation, or its endowment rank on or about April 30th, 1879; and that thereupon certain certificates of membership were issued to plaintiff, one for the sum of one thousand dollars and the other for the sum of two thousand dollars, but this defendant denies that by the contracts of insurance which were then entered into between plaintiff and said

former corporation or its endowment rank, it was agreed
32 that any certain membership fee or monthly payment or assessment should be paid, or that by the terms and conditions of said certificates, that the sum of one thousand dollars and two thousand dollars or any fixed and definite sums were then and

there agreed upon as the amount payable upon proof of death of the plaintiff, but on the contrary defendant avers that the true state of facts with reference to such contracts were as follows:

That the contracts entered into by and between the plaintiff and the former corporation The Supreme Lodge Knights of Pythias of the World, or its endowment rank, consisted of the application then and there filed, the certificates of membership then and there issued to the plaintiff, and the constitution and by-laws of the said former corporation, and its endowment rank then in force, or that might be adopted from time to time thereafter. That said applications upon which said contracts or certificates of insurance were issued, among other things, contained the following stipulations:

"I hereby agree to conform to and obey the laws, rules and regulations of the order governing this rank, now in force or that may hereafter be enacted, or submit to the penalties thereof."

That the certificates of membership issued to plaintiff, and above referred to, among other things recited as follows:

"In consideration of the representations and declarations made in this application, bearing date April 11th, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter
33 to said endowment rank of all assessments as required, and full compliance with all of the laws governing this rank now in force or that may be hereafter enacted by the Supreme Lodge Knights of Pythias of the World, and shall be in good standing under said laws, the sum specified in said certificate of insurance would be paid to the beneficiaries named in said certificate of insurance."

Defendant avers that each and both of said certificates were expressly made subject to all of the conditions stated in the application, which said application was expressly made a part of same, and it was further stipulated in said certificate of membership and contract of insurance for one thousand dollars, as follows, to-wit:

"That if at the time of the death of said brother there shall be less than one thousand members in this class, there shall be only paid a sum equal to one — for each member in good standing in this class."

And defendant avers that it was stipulated in said contract and membership of insurance for two thousand dollars as follows, to-wit:

"That if at the time of the death of said brother, S. Mims, there shall be less than two thousand members in this class, there shall be paid only a sum equal to one dollar for each member in good standing in this class."

The defendant avers that no definite or fixed sum or contribution was mentioned in said certificates or in the application theretofore filed, upon which said certificates were issued, and that in the laws of the former defendant corporation, issuing said
34 certificates fixing the amount of contribution by the plaintiff and the other members of the endowment rank of said corporation, there was expressly reserved the right to change, alter and amend the same as the necessities of said corporation or its en-

dowment rank might require from time to time. That express power to amend its by-laws, rules and regulations was given by its charter to the supreme governing body of said former corporation, and that all certificates issued by it were issued under said reserved right so given said former corporation to amend and change its laws, rules and regulations, and this was well known to the plaintiff in this case.

That afterwards, to-wit, about May 7th, 1885, plaintiff voluntarily surrendered the two certificates hereinbefore referred to and accepted in lieu thereof a certificate in the fourth class of the endowment rank of the former corporation, The Supreme Lodge Knights of Pythias of the World, which said certificate, among other things, recited as follows; to-wit:

"Provided however, that if at the time of the death of said brother, one monthly payment to the endowment fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment of the endowment fund by each member holding an equal amount of endowment."

The said certificate of insurance so issued to plaintiff contained no rate of contribution, nor did it require said corporation issuing the same to pay three thousand dollars or any fixed and
35 definite sum beyond the amount realized from one monthly payment on the endowment fund by members in good standing, and that the laws of said corporation issuing said certificate, then in force, expressly reserved to it the right to change, alter and amend the rate of contribution from time to time as its necessities might require.

The defendant avers that in said certificate of insurance so issued and sued on in this case, it was expressly provided as follows:

"In consideration of the representations and declarations made in this application above set out which application is made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said endowment rank, of all monthly payments as required, and the full compliance with all of the rules governing this rank, now in force or that may be hereafter enacted, and shall be in good standing under said laws, the sum specified in said certificate of insurance would be paid by the Supreme Lodge Knights of Pythias of the World, to the beneficiaries named in said certificate."

And defendant avers that it was further specially provided in said certificate as follows:

"And it is further understood and agreed that any violation of the within mentioned conditions or the requirements of the laws in force governing this rank, shall render this certificate and all claimants null and void, and that the supreme lodge shall not be liable for the above sum or any part thereof.

36 (8) Defendant avers and states that it never issued the contract of insurance sued on in this case to plaintiff, nor authorized its issuance.

Defendant avers that the charter of said corporation known as The Supreme Lodge of the Knights of Pythias of the World, expired by limitation on or about May 5th, 1890, and that from said date up to about June 29th, 1894, no corporation existed, but a society known as The Supreme Lodge of the Knights of Pythias acted as a fraternal insurance company without any charter and without being a corporation until on or about June 29th, 1894. That under the laws existing when said unincorporated society began acting as a fraternal insurance company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, express power was given to and existed in said unincorporated society and its supreme governing body to change and amend its laws and to change and raise the rates of assessments, and that the plaintiff when he became a member of said unincorporated society was bound by said laws so existing, and expressly ratified and acquiesced in the right of said unincorporated society to so amend and change its laws and raise the rates of assessments on certificates of insurance for which said unincorporated society might become in any way responsible. That in the year of 1894 this defendant, the Supreme Lodge Knights of Pythias, was incorporated as above alleged, by an Act of Congress approved by the

37 President June 29th, 1894. That subsequently, in the year of 1900, said act of incorporation of this defendant was amended, and that subsequently in 1907 said act of said incorporation was further amended by the Congress of the United States and that this defendant has been acting under said acts of incorporation and amendments thereto since said date of its incorporation. That under the acts of incorporation of this defendant and amendments thereto, express power was given to change and amend its by-laws, rules and regulations and that such rights was also given and clearly set forth and defined in the constitution, laws and regulations of the supreme governing body of this defendant.

This defendant avers that when it became a corporation and received dues, assessments or payments from the plaintiff in this case upon the certificates of insurance, alleged to have been issued by the former corporation, The Supreme Lodge Knights of Pythias of the World, or alleged to have been issued by the unincorporated society, if it did receive such dues, assessments or payments, which is not admitted but expressly denied, it did so upon obligation both expressed and implied upon the part of the plaintiff that he would comply with the laws in force, existing and subsequent to the time this defendant was incorporated as aforesaid, whether those laws were the laws adopted by the unincorporated society or by this defendant. That plaintiff, before and since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws, and under
38 which it operated at the date of its incorporation, and adopted by it from time to time, or with notice thereof, expressed or implied. That frequently since this defendant became a cor-

poration, the plaintiff dealt with it as such in paying assessments upon certificate or certificates issued to plaintiff by either the former corporation or said unincorporated society, this defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases of his rates of assessments both by the unincorporated society and by this defendant, and paid the same and has paid special assessments previously required of him, both by said unincorporated society and by this defendant under his certificate of insurance sued on in this case. That plaintiff, by his acts, has acquiesced in and ratified by his conduct and action the rights of this defendant and the rights of said unincorporated society to so amend the laws as to the rate of assessments, and that by such action the plaintiff had waived all objection to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained of by the plaintiff, were and are binding upon the plaintiff, by virtue of plaintiff's implied obligation and plaintiff's acquiescence and ratification of said laws passed heretofore by said unincorporated society and by this defendant, and by virtue of the stipulation contained in his application for his certificate of insurance and his certificate, and by virtue of the constitution and laws of the defendant, order, and by reason of the fact that plaintiff became a member of the unincorporated society above referred to, and a member of

39 this defendant corporation, and one of its subordinate lodges at the times above alleged, and at the time of and after this defendant was incorporated, as above stated.

The defendant avers that defendant's rights and any claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing endowment rank or the insurance department of this defendant, and the amendments thereto adopted by this defendant, and that any obligation of this defendant to the said plaintiff under the certificate alleged to have been issued to him in this case and sued on herein, are governed by the charter of this defendant, its laws, rules and regulations governing the rights of the members of the order of the Supreme Lodge Knights of Pythias, or amendments thereto adopted by this defendant.

The defendant alleges that under the constitution, laws, rules and regulations of this defendant, under which it was acting at the time it was incorporated, and under which it has acted since its organization as a corporation, the right was and is expressly given the defendant to increase its rates of assessments, and the rates of assessments levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the endowment rank or insurance department of this defendant, unless otherwise provided for by the supreme lodge or board of control of the endowment rank of the Knights of Pythias. In other words, that by the charter, laws and regulations adopted by this defendant

40 since its incorporation and under which it was acting when it became incorporated, and under which the said unincor-

porated society was acting at the time plaintiff became a member and at the time this defendant was incorporated, the express right was given and retained by said unincorporated society and by this defendant, all of which were acquiesced in and ratified by the plaintiff, to increase rates of assessments on any certificate issued by this defendant or by said unincorporated society, or for which this defendant or said unincorporated society might in any way become responsible for the payment of, either expressed or implied.

The defendant specially denies that it ever in any manner, in writing or otherwise, assumed the payment of the certificate sued on in this case, as alleged in plaintiff's petition, or has ever obligated itself in any way, binding under the law, to carry out the alleged contract made between the plaintiff and the old corporation as evidenced by the certificate alleged to have been issued by said old corporation and sued on in this case, or as evidenced by the certificate alleged to have been issued or assumed by the unincorporated society and sued on in this case.

Defendant avers that the old corporation was a fraternal beneficiary association, organized and chartered as above alleged, under the laws of the United States; that said unincorporated society known as The Supreme Lodge Knights of Pythias, was an unincorporated fraternal beneficiary association acting under laws existing at the

41 date of the expiration of the old corporation, and under laws adopted by it, between that time and the date of the incorporation of this defendant.

That since the incorporation of this defendant, as above alleged, defendant is and has been a fraternal beneficiary association, operating under the laws existing and adopted by it at the time of its incorporation and subsequent thereto, and under the charter of incorporation and amendments by the Congress of the United States above referred to.

Defendant avers that members of the endowment rank, of said old incorporation, said unincorporated society and of this defendant and of the insurance department of this defendant, occupied and always have occupied a dual position, each of said members being the insured on the one hand, and as such entitled to the benefits conferred upon them by their contracts, and each of said members of said old corporation, said unincorporated society and of this defendant being on the other hand insurers, and as such bound to comply with all of the laws of said respective associations and to contribute to that end and into their respective funds, a sufficient amount to enable them and each of them to carry out the contracts made with its members, or for which they might become liable to its members.

Defendant avers that occupying such dual position which plaintiff occupied towards said corporations and said unincorporated society, the plaintiff is bound under the laws and regulations of same to contribute as required by same any and all amounts made necessary in order to enable said associations and corporations to carry

42 out the contracts with its members, which contracts plaintiff was as much obligated to carry out as was either of the other members of each of said societies or corporations, and it would be inequitable and unjust for this plaintiff to be permitted to recover from this defendant contributions or the value of his certificate, when he as an insurer, together with all of the other members of said fraternal association, is obligated to make such payments for the purpose of carrying out contracts entered into by said association with its respective members, plaintiff being one of the members, who had promised to pay certificates for which said association might become liable.

Defendant denies that on to-wit, August 2, 1910 the defendant, through its supreme lodge, it being its supreme governing body, wrongfully and illegally passed and threatened to promulgate any laws or amend laws as alleged in plaintiff's petition, and defendant specially denies as alleged in plaintiff's petition that the amended laws or laws passed by this defendant on August 2nd, 1910 were a wrongful breach or any violation at all of plaintiff's contract of insurance sued on in this case, and defendant specially denies that it breached in any way the certificate or contract of insurance sued on by the plaintiff, and defendant specially denies that the acts of defendant or the laws passed by the defendant on August 2nd, 1910, or of the defendant's conduct in reference to said laws so passed, were as alleged by plaintiff, wrongful or illegal or a violation of defendant's contract with plaintiff, as alleged in plaintiff's petition, and the defendant specially denies that said laws passed by defendant in August, 1910 amounted to or were a repudiation of any contract
43 of insurance by defendant with plaintiff, or illegal, wrongful, illegal or in any respect unreasonable or in any respect violative of any of the rights of plaintiff under any contracts or certificates of insurance made by this defendant with plaintiff, or for which this defendant might be held liable to plaintiff. The defendant denies that beginning with the first day of January or that under the laws adopted by defendant in August 1910 or any proceedings or actions done or had by this defendant, that it violated in any respect any contract with the plaintiff, or that it increased the monthly dues of plaintiff to a prohibited amount, and defendant denies that the increase made in said rates of assessments or monthly dues and rates of contribution were unreasonable, or that they were in violation of any contract between the plaintiff and the defendant, and defendant denies that they were in any way the result of fraud or mismanagement on the part of the defendant, its agents or servants, but on the contrary it avers it to be true that the increase made in the rates of contribution of the plaintiff were necessary, just and reasonable in order that defendant might be enabled to carry out any obligation it might have been under to plaintiff or other members of the fourth class and in order that it might fulfill and discharge all of its duties or obligations, if any, to plaintiff or any members of the defendant's insurance department.

Defendant avers that any certificate of membership issued by this defendant, and any obligation or liability, if any, on the part of this defendant to the plaintiff, was subject to its constitution, by-laws, rules and regulations, and that as was well known to the plaintiff its laws provided that all assessments should be paid monthly in advance, and the defendant avers that the plaintiff failed to pay any assessment since the 1st day of Feb'y, 1911, and has failed to pay any amount whatever to this defendant since said time; that in plaintiff's application for membership in the former corporation, the Supreme Lodge Knights of Pythias of the World, which was a part of said contract of insurance sued upon herein and in the laws of this defendant and in the contract of insurance sued on by plaintiff, it is specially provided that in the event of the failure or neglect to pay any assessments, monthly payments or dues, as prescribed by laws of said association said certificate shall become null and void, and all right, title and interest therein, as well as the rights of the beneficiaries and heirs to the benefits and privileges accruing thereunder should be forfeited. That plaintiff's application upon which he obtained the certificate sued upon in this case, contained a provision whereby the insured agreed that he would be governed by and the contract of insurance should be controlled by the laws and regulations enacted by the corporation issuing said certificate governing said rank then in force or that might be thereafter from time to time enacted by the supreme lodge, or submit to the penalties therein contained.

Defendant avers and alleges that in the month of August, 1910, this defendant, as it was authorized to do, made certain changes in the rate of insurance to be uniformly applied to all the certificates in the fourth class according to the age of its members, and that by such change the assessments of plaintiff's certificates were increased as alleged in plaintiff's petition. That the plaintiff had acquiesced in previous increases in his rates of assessments and had paid special assessments previously required by this defendant, the Supreme Lodge under the certificate of insurance issued to him as aforesaid, and had acquiesced in and ratified, by his conduct and actions, the right of defendant to so amend and change its laws as to the rate of assessments, that by such actions of the plaintiff, in addition to the obligations which rested upon him when he became a member of the order of the Knights of Pythias, and of this defendant corporation, he waived all objections to the exercise of such rights by this defendant, and this defendant avers that said raise in rates was binding upon the plaintiff by virtue of all of the above facts alleged and by reason of the stipulations contained in his application, his certificate of insurance and by virtue of the constitution and laws of the defendant's order.

Defendant further avers that on account of the failure of said plaintiff to make any payments to said defendant of his assessments, since the 1 day of Feb'y, 1911, he has forfeited all rights whatever under his said certificate of insurance against this defendant, and that same is in accordance with the constitutions and by-laws of this

defendant, as well as said application for insurance and his certificate for insurance became thereby null and void and of no effect.

Defendant avers that at the time of the increase of rates by this defendant, complained of by the plaintiff, the same was necessary by reason of the fact that defendant's income was not sufficient to meet the liabilities accrued and to accrue under fourth class certificates issued to various members of its insurance department, and that in order to protect said certificate of plaintiff and all other certificates in said fourth class, and in order to promote and protect its own existence, this defendant was compelled to raise its rates and that such rates was in contemplation of the parties under contract sued on in this defendant corporation.

Defendant further answering plaintiff's petition denies that it has ever violated or broken any contract of insurance existing between plaintiff and defendant prior to 1st day of Feb'y, 1911, or at any time, or that it has deprived or attempted to deprive plaintiff of his rights in and under said contract, and defendant denies that plaintiff has been in any manner damaged in the sum claimed in plaintiff's petition, or in any other sum by the act of this defendant.

Defendant avers that if plaintiff has any rights against this defendant by reason of any sum of money belonging to the members of the fourth class of the former corporation, the Supreme Lodge of the Knights of Pythias of the world, or of the fourth class of the unincorporated society existing as a Supreme Lodge Knights of Pythias from the year 1890 up to the year 1894, when this defendant was incorporated, that plaintiff's pro rata in said funds received would amount to not more than three hundred or four hundred dollars, for this defendant avers that at the time of the passage of the laws complained of in this case by plaintiff, the sum received

47 by this defendant from the former corporation, the Supreme Lodge Knights of Pythias of the World, and from the unchartered society above referred to had been used in paying certificates of the fourth class members of said corporation and said society, until at the time of the passage of said laws there was existing of the mortuary fund of the fourth class of which plaintiff was a member, about \$700,000, and that the number of members in said fourth class at said time were 11,409, carrying insurance against said fund to the extent of \$21,763,000.

That up to January 1st, 1911, when the rates of assessment adopted by this defendant corporation in August, 1910, went into effect, the mortuary fund of said fourth class members had been reduced by payments on account of the death of said members to the sum of about \$500,000, and that the number of members of said fourth class at said time were about 8,784, carrying insurance against said fund amounting to \$16,993,500. That under the laws of the defendant and under the laws of the previous corporation, the Supreme Lodge, Knights of Pythias of the World, and under the laws of the unincorporated society above mentioned, benefits or insurance to be paid for the fourth class members were to be paid out of said mortuary fund, and the assessment levied on the fourth class members; that the assessments levied upon the said fourth class members

were not sufficient to pay the death losses accruing to same, and that said fourth class mortuary fund was being reduced on account of said fact at or about the time the raise in rates complained of in this case was made, in about the sum of \$60,000 per month in order to meet liabilities on account of the death of said fourth class members.

Defendant admits that it passed the laws hereto attached and marked "Exhibit B", at the August 1910 convention of its Supreme Lodge, but defendant avers that said laws were just, reasonable and necessary; that it had the authority and power to pass same, and that said laws, by reason of the facts stated in this answer and by reason of the further facts hereinafter stated, were binding and obligatory upon plaintiff, and defendant avers that plaintiff's failure to comply with said laws operated as a forfeiture of any rights plaintiff had under his certificate of insurance sued on in this case.

Defendant further answering denies that plaintiff is entitled to the relief prayed for in his petition, for the reason stated in the foregoing portion of its answer, because of the following facts which defendant avers to be true;

(1) That by reason of the fact that defendant is a fraternal benefit society, as averred in this answer, it possesses the inherent power to make and enact such laws, rules and regulations respecting its business and the rights, duties and obligations of its members of the order of the Knights of Pythias and of their beneficiaries, and to, from time to time, as it may deem necessary and proper, repeal, alter, change amend and enact new rules and regulations respecting same, and to bind every member of the defendant corporation and their beneficiaries, in so far as membership in the defendant society and the rights and obligations pertaining thereto are concerned by such laws, rules and regulations and repeal, alter, change, amend and make new laws, rules and regulations. That in addition to said inherent power, defendant possesses expressed power to make such changes in its laws as herein stated by reason of the agreements contained in the application for membership in defendant society and which is binding upon the plaintiff by reason of the statements contained in his application and the benefit certificates issued to the plaintiff upon which he seeks to hold this defendant liable, all of which is set out at greater length in the preceeding paragraph of this answer.

2. That the adoption and enactment by defendant of the statutes and by-laws by which the rate of monthly contributions of plaintiff and other members of the insurance department was increased, as complained of by plaintiff, was made to apply to and does apply to mutually and equally all of the members of the fourth class of the defendant's insurance department, who were members at and before the time when said statute and by-laws took effect and became operative, and that in every particular in this application the said members and other beneficiaries of all the provisions of said statute were and are mutual.

3. That if the defendant had not adopted and enacted said monthly contributions and payments of the plaintiff and other mem-

bers of its insurance department, it would have been unable to preserve its life and that its society would have disintegrated, and it would have been unable to have paid the beneficiaries of its members the benefit certificates which had been issued to said members as same would mature, and this is true because of the fact the plaintiff and all of the other members of the defendant's fourth class of the insurance department were not, at the time of the enactment, of
 50 said statute, and had never paid sufficient moneys to pay said fourth class claims, of which said fourth class the plaintiff and his association were members at the times mentioned herein.

4. The defendant further answers plaintiff's complaint and avers that the by-laws of the defendant corporation provides as follows:

"Contracts of insurance made in the insurance department shall be made with reference to the laws of the state, territory or province where the head office of the insurance department may be located at the time made, and all such contracts, shall without reference to the place of residence of the members, be deemed contracts of such state, territory or province where said head office is located at the time made, and to be controlled by the same. In any suit at law or equity brought upon or involving any benefit certificate issued by the insurance department, this rule is applied to the exclusion of any rule or law to the contrary, and the rights of the parties claiming through or by reason of said certificate and the obligations of the insurance department shall be determined by the law of the state, territory or province where such head office was located at the time said certificate was issued."

At the time the certificate was issued and the contract entered into upon which plaintiff sues, and for the alleged breach of which plaintiff sues herein, the home office of this defendant corporation and of the former corporation, the Supreme Lodge Knights of Pythias of the World and the unincorporated society, was in the

City of Chicago, Illinois, and the defendant avers that on ac-
 51 count of the location of said home office and bylaws of this defendant corporation and of the former corporation the Supreme Lodge of Knights of Pythias of the World, the laws of the State of Illinois apply in determining the rights of the plaintiff and the obligations of the defendant, and defendant asks that the laws of the State of Illinois be applied in the determination of this cause.

Defendant avers that under the laws of the State of Illinois the defendant had the right and said laws authorized the acts done by the defendant, for the defendant avers that under the decisions of the Supreme Court of Illinois in the case of Fullerwider versus the Supreme Council of the Royal League et al., decided on June 21st, 1899, by the Supreme Court of Illinois, which affirmed the same case decided by the court of appeals of said state, as reported in the 73rd Illinois Appeals, 321, the said cause by the Supreme Court of Illinois being reported in the 180 Illinois Reports, page 621, and it is expressly decided under the laws of the State of Illinois where the application and certificate contain language similar to the language contained in the application and certificate sued on and referred to in this case, the right to increase rates of assessments and

to rerate the members of the respective bodies issuing such certificates or contract of insurance, existed and would be upheld.

Defendant denies all manner of unlawful actions whatsoever whereby it is in any way by said petition of the plaintiff charged, all of which matters and things this defendant is ready and willing to prove, as your honorable court shall direct and prays to be hence dismissed with its reasonable costs and charges in this behalf
 52 most wrongfully sustained, and defendant prays for all other and further relief legal and equitable, general and special, which under the law and facts of this case it may be entitled, and will ever pray.

CRANE & CRANE AND
 H. P. BROWN,
Attorneys for Defendant.

Filed March 1, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In District Court, Dallas County, 44th Judicial District.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's First Supplemental Petition.

By leave of Court, the plaintiff files the following, his First Supplemental Petition, in response to defendant's First Amended Original Answer herein, and for such Supplemental Petition says:

1.

He specially excepts to all that portion of said answer undertaking to set forth certain alleged by-laws of the defendant corporation undertaking to provide that contracts of insurance shall be made with reference to or be governed by the laws of the State of Illinois, because the dates or times are not given or set forth when such by-laws are claimed to have been enacted or to have become effective, and it is not shown or alleged that such by-laws, or pretended by-laws, were in force at the origin of plaintiff's contracts of insurance, or were enacted at a time or in a manner to become part of plaintiff's contracts of insurance, and of this plaintiff prays judgment.

53

2.

Plaintiff specially excepts to all that portion of the defendant's said answer setting forth that the laws of the State of Illinois gave defendant "The right to do the acts complained of by plaintiff, and said laws authorized the acts done by this defendant," because of

the generality of said allegation, and because the same does not in any manner set forth the laws or dates of enactment thereof, of the State of Illinois, which are claimed to have been in force and to have become a part and portion of plaintiff's contract, and because it is not alleged whether said laws of Illinois were statutory enactments or announcements of decisions of the Courts of Illinois, and if the latter, of what courts; and of this plaintiff prays judgment of the Court, etc.

3.

Plaintiff denies all and singular the allegations of the defendant's answer, and of this puts itself upon the country.

L. C. McBRIDE,
THOS. F. WEST,

Attorneys for Plaintiff, S. Mims.

Filed February 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By S. T. Jackson, Deputy.

In the District Court of Dallas County, Texas, 44th Judicial District.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE KNIGHTS OF PYTHIAS.

First Amended Supplemental Petition.

The plaintiff files this, his First Amended Supplemental Petition in lieu of his First Supplemental Petition filed February 54 14th, 1913, and in response to defendant's First Amended Original Answer filed March 1st, 1913, and says:

1.

He denies all and singular defendant's allegations, and of this puts himself upon the country.

2.

He specially denies that he ever at any time acquiesced in or became a party to any laws or became a party to any laws or pretended laws in any manner undertaking to authorize in his rate of assessments, and on the contrary shows to the Court that when the fourth class as referred to by him in his petition was created in the year 1884 a schedule of rates was enacted by the corporation issuing plaintiff's policy, which schedule of rates fixed forever the amount of assessment to be paid by plaintiff under his contracts of insurance; that plaintiff was induced to enter the fourth class and accept policies therein expressly relying upon the express and implies promises that there would thereafter be no further raise in the rates of his assessments than as consented to by him when entering said fourth class.

That plaintiff never at any time knew or acquired any knowledge of any law or pretended law whatsoever thereafter claimed to have been enacted, authorizing any raise in his rates.

That plaintiff did not even know, until after this suit was filed, that the original corporation issuing his policies had died by law in 1890 and that the defendant herein was a new corporation. That plaintiff never at any time had any knowledge of any by-laws whatsoever enacted by the defendant herein, and never consented thereto.

55 Wherefore plaintiff says that the defendant herein expressly assumed the payment of plaintiff's contracts with all the burdens thereof, and is estopped in law and in equity to claim that it had the right to require of plaintiff the payment of any assessments under his contracts in excess of the amount agreed upon as aforesaid, in the year 1884, when he entered the fourth class, as aforesaid.

THOS. F. WEST,
L. C. McBRIDE,
Attorneys for Plaintiff, S. Mims.

Filed March 11, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, 44th Judicial District.

S. MIMS

vs.

SUPREME LODGE KNIGHTS OF PYTHIAS.

Defendant's First Amended Supplemental Answer.

Now at this time comes the defendant in above numbered and entitled cause, and makes and files this its First Amended Supplemental Answer, and replying to plaintiff's First Amended Supplemental Petition, filed herein, says:

I.

The defendant excepts to said Supplemental Petition and says that the matters and things therein contained are wholly insufficient in law, and show no cause of action against this defendant.

II.

The defendant specially excepts to all of that part of said supplemental petition wherein the plaintiff denies that he ever at any time acquiesced in or became a party to any laws or pretended laws undertaking to authorize a raise in the rate of assessment, and alleging that the law governing the fourth class in 1884 in the old corporation fixed forever the amount of assessment to be paid by plaintiff for the following reasons, to-wit:

(a) Because the plaintiff having become a member of the unin-

corporated society as alleged in the original petition in 1890, and having become a member of the defendant corporation, which as alleged in his petition, was incorporated in 1894, by virtue of the fact of his becoming a member of said unincorporated society, and said defendant corporation, necessarily became bound by the laws governing the said unincorporated society, and said defendant corporation, and the laws under which certificates of insurance were issued by them or assumed by them.

(b) Because the charter under which the old corporation which is alleged to have issued plaintiff's certificate, was organized, and the laws of said old corporation expressly reserving the right to said corporation to amend its laws, and plaintiff in his application for membership, and in his certificate having agreed to comply with said laws thereafter enacted, was bound by any subsequently enacted laws, both by reason of the inherent right of said old society to amend its laws as necessity demanded, and by reason of the express stipulations authorizing amendments to said laws, given by its charter and by its laws in force when plaintiff's certificate was issued, and by reason of the contract and agreement of plaintiff when his certificate was issued to him by said old corporation.

III.

56 (c) Defendant expressly excepts to all that part of plaintiff's petition alleging ignorance of the expiration of the charter of the old corporation, and of defendant's charter, and ignorance of the laws of said defendant for the reason that plaintiff being a member of said corporation, and one of the parties insuring, as well as one of the insured, was necessarily affected with notice of the laws of the fraternal society of which he was a member and of its charter and of the powers given to said old corporation by its charter and by its law, and because further plaintiff having become a member of the unincorporated society at the expiration of the charter of the old corporation and a member of the new corporation, this plaintiff was necessarily bound to take notice of the laws of same at the time he became a member, and as such member was in law bound by said laws.

IV.

Defendant specially excepts to all that part of plaintiff's supplemental petition wherein he alleges that defendant herein expressly assumed the payment of plaintiff's contract and all the burdens thereof, and is estopped in law and in equity to claim that it had the right to require of plaintiff the payment of any assessment under his contract in excess of the amount agreed upon as aforesaid in the year, 1884, when he entered the fourth class, for the following reasons, to-wit, because the facts alleged are not sufficient to constitute an estoppel.

57 (a) Because plaintiff having become a member of the old corporation as alleged by him, and the charter and the law of the old corporation at the time he became a member expressly giving said old corporation the right to amend its

by-laws, plaintiff was bound by any amendments subsequently enacted.

(b) Because plaintiff having expressly in his contract and application for insurance, and in his certificate agreed to abide by the laws thereafter enacted by said old corporation, and to pay all assessments as required was obligated to and his certificate of insurance was governed by such subsequently enacted laws.

(c) Because this defendant being an entire and distinct corporation, any alleged assumption of it of any contract issued by any former corporation must necessarily have been in writing and supported by a valid consideration, and plaintiff fails to allege any written assumption by this defendant of the payment of plaintiff's contract with said old corporation, and plaintiff's said supplemental petition fails to show any consideration supporting said alleged assumption of plaintiff's contract.

(d) Because the alleged assumption of plaintiff's contract by this defendant not being alleged to be in writing would not be binding upon this defendant because any such assumption in order to be binding upon this defendant would have to be in writing under the statutes of fraud of this state.

(e) Because plaintiff having become a member of defendant corporation at the time of its organization was affected with the laws governing at the time he became a member, and bound by such laws, and plaintiff cannot claim the benefits against this defendant of a contract entered into by the old corporation without assuming and

58 becoming responsible for the burdens imposed by its charter and laws upon the members of defendant corporation at the time of its organization, and at the time plaintiff became a member of same.

V.

And for further answer to said supplemental petition this defendant denies all and singular the allegations therein contained, and demands strict proof of same.

VI.

And for further and special answer to plaintiff's petition this defendant says that it expressly denies that it assumed in writing or otherwise, expressly or impliedly, the payment of plaintiff's contract with the old corporation, whose charter expired by limitation in 1890. Defendant avers that it never assumed any such contracts, and defendant expressly says that it never received any consideration for any assumption by it of plaintiff's contract with said old corporation, and defendant further says that since the formation of defendant corporation, and defendant further says that since the formation of defendant corporation, and since its organization defendant has made frequent changes in the rates of its assessments, and required plaintiff to pay same and plaintiff has paid the same and acquiesced in the power exercised by this defendant in changing the rates of assessment and raising said rates, and plaintiff has expressly and impliedly ratified the exercise of such power by this defendant.

VII.

Further answering defendant says that it received no consideration either from plaintiff or from the old corporation which is alleged to have issued plaintiff's certificate of insurance for any assumption as alleged in said supplemental petition of the payment of plaintiff's contract with said old corporation, and this the defendant is ready to verify.

Wherefore, this defendant prays as in its original answer, and will ever pray.

CRANE & CRANE AND
H. T. BROWN,
Attorneys for Defendant.

Filed March 11, 1915, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, 44th. Judicial District.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's Notice to Produce.

To the defendant and its attorneys of record, Crane & Crane:

You will please produce upon the trial of this cause:

1. All records, books and data whatsoever of the defendant, or any of its subsidiary councils or orders, showing the amount and date of payment of any and all dues, assessments and payments whatsoever at any time paid by the plaintiff to the defendant, or any of its officials, agents or subsidiary orders.

2. Any and all benefit certificates or insurance policies at any time issued by the defendant order upon plaintiff's life, also any and all applications at any time made by the plaintiff to defendant for the issuance or exchange of benefit certificates.

3. Any and all laws and by-laws of the defendant order in force at the dates of (1) the application for and issuance of the initial or first benefit certificate on plaintiff's life; and (2) the date or dates of the exchange by plaintiff of any benefit certificate, one for the other; and (3) such laws pertaining to assessments and dues, and amounts and payments thereof, as were in force just prior to August 1910, the date of the passage by defendant's Supreme Lodge of its laws or by-laws pertaining to assessments as now claimed to be in force.

4. All laws or by-laws of the defendant as passed by its Supreme Lodge in August 1910, or at any of its sessions during said year, and particularly such as bearing upon the question of the payments of assessments and the amounts thereof, dates of payment thereof, etc.

5. Any and all laws of the defendant order creating and defining the "Fourth Class" of its insurance membership, and which laws define wherein and whereby such "Fourth Class" is distinguished from any other class of membership; also any and all laws or by-laws in any manner bearing upon, regulating, touching or affecting said "Fourth Class" membership.

L. C. McBRIDE,
Attorney for Plaintiff.

Waiver.

We, the undersigned attorneys for defendant, hereby acknowledge receipt from plaintiff's counsel of copy of the above notice, and waive formal service thereof, this September 13, 1911 but do not agree that same is sufficiently definite, certain, and specific; all objections except those waived are reserved, as well — the
61 objection that the notice is unreasonable.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Filed September 26, 1911, H. H. Williams, Clerk District Courts.
By S. T. Jackson, Deputy.

In the 44th Judicial District Court, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's Bill of Exception No. 1.

Be it remembered: That on the trial of this cause the plaintiff objected to the introduction in evidence by the defendant of any laws or by-laws whatsoever claimed to have been passed subsequent to the entry of plaintiff in the fourth class in 1884, because all such laws or by-laws were not and were not shown to be a part of plaintiff's contract, or to in any manner affect same. Which objections were overruled by the court, and the defendant permitted to introduce in evidence the laws or by-laws claimed to have been passed subsequent to plaintiff's entry into the fourth class, which laws and by-laws as so permitted to be introduced are shown in the Statement of Facts to which reference is made, and it was understood and agreed at the time plaintiff made said objection that said objection should be considered as going to the introduction of any and all laws or by-laws whatsoever claimed to have been passed subsequent to the entry by plaintiff into the fourth class in 1884.

62 And plaintiff being allowed his Bill of Exceptions to the introduction of such testimony, this Bill of Exceptions thereo is signed and made a part of the record.

E. B. MUSE,
Judge Presiding.

No. 1.

Filed May 23, 1913. H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court, Dallas County, Texas, 44th Judicial District.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's Bill of Exception No. 2.

Be it remembered: That upon the trial of the above cause, the plaintiff objected to the introduction of all testimony whatsoever bearing upon the financial condition of defendant Order, or bearing upon the necessity for raising the rates of assessment to meet death claims; and it was agreed by counsel, and consented to by the Court, that plaintiff's objection went to all testimony whatsoever bearing upon said points.

And the Court overruled said objections, and permitted the testimony to said points, as shown in the Statement of Facts, and this Bill of Exceptions is signed accordingly.

E. B. MUSE,
Judge Presiding.

No. 2.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court, Dallas County, Forty-fourth Judicial Dist.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's Bill of Exception No. 3

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Be it remembered: That upon the trial of the above cause, plaintiff objected to the introduction of any and all testimony

whatsoever of the witnesses to the effect that the witnesses considered the raising of the rates as complained of, to be reasonable and necessary, and objected to any testimony whatsoever to the points as to whether said raise in rates was reasonable or necessary; and it was agreed by counsel, and consented to by the court, that plaintiff's objection should go to all testimony whatsoever to said points.

And the Court overruled said objections, and permitted the testimony to said points, as shown in Statement of Facts, and this Bill of Exceptions is signed accordingly.

E. B. MUSE,
Judge Presiding.

No. 3.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court, Dallas County, Texas, Forty-fourth Judicial District.

No. 9290-B.

S. Mims

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Plaintiff's Bill of Exception No. 4.

Be it remembered: That upon the trial of the above cause, the plaintiff objected to the introduction of the testimony of the witness W. O. Powers and of the witness, Wolfe, and of all other witnesses whomsoever to the point, as to what the witness considered the value to be of plaintiff's policy at the time of its breach or at any other time, or as to plaintiff's proportion of any fund
64 on hand, because such testimony was irrelevant, immaterial and incompetent, and the law has fixed the standard of the measure of damage, by reason whereof such testimony was inadmissible.

Which objections were overruled and the testimony permitted, as shown in Statement of Facts, to which plaintiff objected, and it was agreed by counsel and understood by the Court that plaintiff's objection went to all testimony bearing upon said point, and this Bill of Exceptions is signed accordingly.

E. B. MUSE,
Judge Presiding.

No. 4.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co. By C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, A. D. 1913.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exception No. 1.

Be it remembered: That on the trial of the above stated cause at a regular term of said Court, the following proceedings were had:

The defendant in said cause by its counsel suggested to the Presiding judge that he was disqualified to try the case against the defendant. Whereupon the following statement of facts was made by said Judge, to-wit:

"I was a member of the Order of Knights of Pythias up to about two or three years ago, when I was suspended from said Order on account of non-payment of dues. I have never had any

65 insurance in the Insurance Department of the defendant Order, and hold no certificate of insurance therein, and have no financial interest in said Insurance Department and never had."

It was thereupon stated by counsel for defendant, and not denied, that under the laws of the Order the Presiding Judge, who had been a member in good standing in the Order, and who was suspended for non-payment of dues, was under the laws of said Order still under the jurisdiction of the Supreme Lodge and bound as a former member of the Order to uphold and sustain all the laws and regulations of the Supreme Lodge governing the body of said Order, and that this case was a direct attack upon the validity of the laws of the Supreme Lodge, which said Presiding Judge was under obligations to uphold and support. He was disqualified for said reason, and for the further reason that this being a suit against the Supreme Lodge of *why* the said Presiding Judge was and has been a member, and to which, under his own admission, he owes dues which he did not pay the said Judge was disqualified for said reason also.

The Presiding Judge overruled the suggestion of the defendant's counsel, and held that he was qualified to try the case, to which action of the Court defendant then and there excepted, and here and now tenders this its bill of exception No. 1, which defendant asks to be approved, and which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

66 The court approves this bill of exception with the following qualification and statement, which was made and agreed on at the time of the taking of said exception:

That the court was at one time a very active, energetic member

of the Order of Knights of Pythias, as a fraternal member, and the Court after having become a member of this organization found that in truth and in fact he had always been a Knight of Pythias—that the same spirit of fraternalism runs through the Odd Fellows, and that the court was a very consistent member for many years—until about four or five years ago when the court demitted on account of the failure to pay his dues, and has never been re-instated in the order, and has not been for at least four years or more an active member of the Knights of Pythias and that the Court never held one cent of any kind of insurance at any time and does not now hold a cent of insurance. That the court is not directly or indirectly interested in the subject matter of this suit nor in any manner affiliated with the order except in spirit. The court had no access to this branch of the order of any kind—did not have the password or signs and never did. That he is not now and has not for several years been amenable to any of the laws of the Supreme Lodge Knights of Pythias, and that he stands in the attitude of an expelled member, and that the only obligation that is still unbroken of the Knights of Pythias, he is not to write or indict on anything *on anything* movable or immovable or sign or otherwise to communicate or disclose any secret work of the order, which obligation has been and still is intact.

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E. B. MUSE,
Presiding Judge.

Filed May 23, 1913. H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District. January Term, A. D. 1913.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exception No. 7.

Be it remembered that on the trial of the above stated cause, the following proceedings were had:

The plaintiff offered to read in evidence two certificates, one being in the first class and the other in the second class, both of date April 30th, 1879, purporting to be issued by the corporation which was created in 1870, and whose charter expired by its terms, in 1890, to the introduction of which said two certificates in evidence the defendant by counsel then and there in open court objected for the following reasons, to-wit:

1. Because under the pleadings in this case said certificates were not charged to have been issued or executed by this defendant.

2. Because the execution of said certificate by said old corporation or by the officers purporting to have issued the same was not proven, nor was it shown that this defendant corporation had assumed the obligations of said old corporation.

3. Because said certificates were not admissible against this defendant, this defendant not having issued same, and if it had attempted to assume the obligation of same, it was beyond the power of this defendant to assume the debts of said previous corporation without there being legal authority for the assumption of said debts or obligations by this corporation, and there being nothing in the act creating defendant corporation that authorized it to assume the debts or obligations of said old corporation.

4. Because it was further shown and particularly from the allegations of plaintiff's petition, and was also shown by the evidence that these two old certificates purporting to have been issued in 1879 were surrendered by the voluntary agreement of the parties, and as alleged in the pleadings and shown by the evidence, a new certificate in lieu thereof issued in 1885, and it was further shown by the pleadings and by the evidence that all rights under the old certificates purporting to have been issued in 1879 were absolutely destroyed by the agreement to cancel same and accept a new certificate in their stead.

5th. Because it appears by the very terms of the certificate sued on and by the application for transfer that it was issued in consideration of said old certificate.

The court overruled each and all of the objections of the defendant to the introduction of the evidence of said two certificates, and permitted the same to be read in evidence, said two certificates being as follows, to-wit:

"No. 5383. Certificate of Membership. First Class.

\$10.00.

69 Endowment Rank of the Order of Knights of Pythias.

This certifies, That Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his Application bearing date of April 11th, 1879, which Application is made a part of this contract, and the payment of the prescribed Admission Fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this rank, nor in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of One Thousand Dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims, as directed by said Brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the Records of the Supreme Master of Exchequer, upon due notice

and proof of death, and good standing in the Rank at time of death, and the surrender of this Certificate. Provided, however, that if at the time of the death of the said Brother S. Mims, Jr., there shall be less than One Thousand Members in this Class, there shall only be paid a sum equal to one dollar for each member in good standing in this Class, And it is understood and agreed, that any violation of the laws in force governing this Rank, shall render this certificate and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

70 In witness whereof, We have hereunto subscribed our names and affixed the Seal of the Supreme Lodge Knights of Pythias of the World.

D. B. WOODRUFF,
Supreme Chancellor.

Attest:

JOSEPH DOWDALL,
[SEAL.] *Supreme Keeper of Records and Seals.*

Issued this 30th day of April, 1879, P. P. XVI, at Indianapolis, Indiana, and Registered in Book 1, Folio 132.

JOHN B. STUMPH,
Supreme Master of Exchequer."

(Said certificate having the figures "100" printed across same.)

"No. 7869. Certificate of Membership. Second Class.

\$20.00.

Endowment Rank of the Order of Knights of Pythias.

This certifies, that Brother, A. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his Application bearing date of April 11th, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all Assessments as required and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of

71 Two Thousand Dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims, as directed by said Brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the Records of the Supreme Master of Exchequer, upon due notice and proof of death, and good standing in the Rank at time of death, and the surrender of this Certificate. Provided, however, that if at the time of the death of the said Brother, S. Mims, Jr., there shall be less than Two Thousand Members in this Class, there shall only be paid a sum equal to One Dollar for each member in

good standing in this class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

D. B. WOODRUFF,
Supreme Chancellor.

Attest:

JOSEPH DOWDALL,
[SEAL.] *Supreme Keeper of Records and Seal.*

Issued this 30th day of April, 1879, P. P. XVI, at Indianapolis, Indiana, and Registered in Book 1, Folio 193.

JOHN B. STRUMPH,
Supreme Master of Exchequer."

(Figures "2000" printed across fact or certificates.)

72 "Application For Transfer to Fourth Class.

GALV., May 7, 1885.

To Halvor Nelson, Sup. Sec'y of the Endowment Rank, K. of P.:

The undersigned, born on the 6th day of June, 1837, a member in good standing of Section No. 278, Endowment Rank, K. of P., and holding Certificates No. 5383 in 1st Class, which is hereto attached, hereby make application to enter the Fourth Class, in which I desire to hold an Endowment of One Thousand Dollars, and I hereby surrender all my right, title and interest in and to the within Certificate, the benefit upon my death to be paid as follows: to my wife, Mary J. Mims.

S. MIMS, *Applicant.*

I hereby certify that Bro. S. Mims is a member in good standing of Sec. No. 278 E. R., K. of P., and of Humboldt Lodge No. 9 located at Galveston, State of Texas.

[SEAL.]

P. J. WREN, *Secretary.*

(Please observe instructions on back of this blank.)

"This blank must be filled out accurately and completely (one for each certificate surrendered), and must be attached to the same.

In all cases where such terms as "to myself", "To my heirs", "To my legal representatives", "as directed by Will", "or any other vague terms have been used; or if beneficiaries, other than the present ones now in force, are named, some person or persons related to or dependent upon the applicant must be substituted, and a request to change beneficiary in regular form must accompany this application for transfer.

73 Members transferring to the Fourth Class must pay all assessments in the Class or Classes they surrender, of which notice has been issued from this office.

No application for transfer will be entered by the Supreme Secretary until these provisions have been complied with."

"Application for Transfer to Fourth Class.

GALV., May 7, 1885.

To Halvor Nelson, Sup. Sec'y of the Endowment Rank, K. of P.:

The undersigned, born on the 6th. day of June, 1837, a member in good standing of Section No. —, Endowment Rank, K. of P., and holding Certificate No. 7869 in 2nd Class which is hereto attached, hereby make application to enter the Fourth Class, in which I desire to hold an Endowment of Two Thousand Dollars, and I hereby surrender all my right, title and interest in and to the within Certificate, the benefit upon my death to be paid as follows: to my wife, Mary J. Mims.

S. MIMS, *Applicant.*

I hereby certify that Bro. S. Mims is a member in good standing of Sec. No. 278 E. R., K. of P., and of Humboldt Lodge No. 9 located at Galveston, State of Texas.

[SEAL.]

P. J. WREN, *Secretary.*"

(Please observe instructions on back of this blank.)

"This blank must be filled out accurately and completely (one for each certificate surrendered), and must be attached to the same.

In all cases where such terms as "To myself", "To my heirs", "To my legal representatives", "As directed by will", or any other vague terms have been used; or if beneficiaries, other than the present ones now in force, are named, some person or persons related to or dependent upon the applicant must be substituted, and a request to change beneficiary in regular form must accompany this application for transfer.

Members transferring to the Fourth Class must pay all assessments in the Class or Classes they surrender, of which notice has been issued from this office.

No application for transfer will be entered by the Supreme Secretary until those provisions have been complied with."

To which action of the Court the defendant then and there in open court excepted, and here and now tenders this its Bill of Exception No. 4, and asks that the same be approved and signed by the Court which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This bill of exceptions examined, signed and approved and ordered filed as a part of the record in the cause. This the — day of —, A. D. 1913.

Judge 44th Judicial District of Texas.

For Bill of Exceptions, No. 4.

The foregoing Bill approved with the following qualification:

Plaintiff having given defendant's counsel notice to produce said cancelled benefit certificates, those first issued counsel for defendant did in compliance with such notice produce such cancelled benefit certificates upon the trial of the case, and same were then and there introduced by the plaintiff.

May 23, 1913.

E. B. MUSE,
Judge Presiding.

Filed May 23, 1913. H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, A. D. 1913.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 5.

Be it remembered that on the trial of the above stated cause, the plaintiff offered in evidence certificates No. 4183, purporting to have been issued May 29th, 1885, by the old corporation, the Supreme Lodge, Knights of Pythias of the World, chartered in 1870, which charter expired by limitation in the year 1890, The defendant then and there in open court objected to the introduction in evidence of the said certificate for the following reasons, to-wit;

1. Because said certificate purporting to have been issued by the corporation created in 1870 and which expired by its own limitation in the year 1890, there was absolutely no proof that said certificate was executed by said corporation, and said certificate was not charged to have been issued by this defendant corporation, and because said certificate was not proven to have been executed or authorized to be executed by said corporation purporting to have issued the same, nor was it proven that the officers purporting to have issued the same as the act of the old corporation, were authorized to issue said certificate.

2. Because there was no proof that the liability imposed upon said old corporation by said certificate had been assumed by this defendant corporation.

3. Because it was not shown that this defendant corporation had any authority to assume the liability imposed upon said old corporation by the issuance of said certificate, if same had been issued by it.

4. Because the execution of said certificate purporting to have been issued May 29th, 1885, it being the one upon which this suit is based, had not been proven and was not proven.

5. Because the plaintiff did not offer, and refused to offer, in connection with the said certificate the written obligation upon which the said certificate, if issued at all, was purported to have been issued.

6. Because said certificate having been issued by a corporation, if issued at all, was issued by a corporation whose charter expired by limitation as shown by the pleadings in evidence in the year 1890 and under the pleadings in evidence in this case this defendant corporation, not having been chartered until the year 1894, any rights or claims which plaintiff may have had against defendant by reason of the issuance of said certificate to him would be governed by the laws of this defendant, and any rights under said certificate, if any ever existed against said old corporation or against this defendant were and are barred by the statute of limitation of four or two years.

77 7. Because under the pleadings in this case and under the evidence, this being a suit by the plaintiff to recover an interest in the funds of this defendant corporation on account of the issuance to said plaintiff of said alleged certificate offered in evidence, and the charter of this corporation as shown by the evidence expressly providing that the funds and property of said corporation should not be divided among the members of the corporation, plaintiff would have no right to recover against this defendant any interest in the funds of this defendant by reason of the issuance to him of said certificate by said old corporation, or by reason of any other facts stated in plaintiff's petition, the plaintiff having as shown by his petition in evidence become a member of this corporation when it was incorporated, and being bound by the charter of this defendant corporation, could not have or recover any interest in the funds of this corporation in direct violation of said charter, plaintiff being a member and having become a member of such corporation at its organization.

8. Because in the absence of testimony showing that this defendant had received funds from said old corporation purporting to have issued said certificate, or from the unincorporated society, which as shown by the pleadings in evidence did business from the year 1890 to the year 1894, when this defendant was incorporated, any right of recovery against this defendant, if any such right ever existed or did exist in plaintiff was limited to the right of plaintiff to recover solely on account of the premiums paid by her to this defendant, and could in no event exceed the amount of the premiums or assessments paid to this defendant the value of the policy or certificate of insurance at the time of the alleged breach of contract set up on plaintiff's petition.

The Court overruled the objections of the defendant, and permitted said certificate to be read in evidence without any proof of its execution, which said certificate so introduced in evidence is as follows, to-wit:

"No. 4183.

Certificate of Membership.

Fourth Class.

\$3,000.

Endowment Rank of the Order of Knights of Pythias.

This certifies that Brother Shadrock Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278, on April 11th, 1879, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11th, 1879, and his absolute surrender of the Certificate heretofore held by him in 1st and 2nd classes for cancellation, as requested in his Application for transfer to the Fourth Class, bearing date of May 7th, 1885, all of which is made a part of this contract and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required; and the full compliance with all the laws governing this rank; now in force, or that may hereafter be enacted, and shall — in good standing under said laws, the sum of Three Thousand Dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said

79 Brother in his Application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon the notice and proof of death, and good standing in the Rank at the time of death, and surrender of this Certificate.

Provided, however that if, at the time of the death of said Brother one monthly payment to the Endowment Fund by members holding an equal amount of Endowment, shall not be sufficient to pay the amount, of Endowment, held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding an equal amount of Endowment. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank; shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In witness whereof, We have hereunto subscribed our names and

affixed the seal of the Supreme Lodge of the Knights of Pythias of the World.

JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,
Supreme Keeper of Records and Seal.

[SEAL.]

Issued this 29th. day of May, 1885, P. P. XVII, at Washington, District of Columbia, and registered in Book 1 Folio 84.

HALVOR NELSON,
Supreme Secretary."

80 To which ruling of the Court the defendant then and there in open court excepted, and here and now tenders this its Bill of Exception No. 5, and asks that the same be approved and signed by the Court, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This bill of exception examined, signed and approved, and ordered filed as a part of the record in the cause. This the 23 day of May, A. D. 1913.

E. B. MUSE,
Judge of 44th Judicial District of Texas.

Filed May 23, 1913. H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett Deputy.

In the District Court of Dallas County, Texas, for the 44th. Judicial District, January Term, A. D. 1913.

S. MIMS,

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 6.

Be it remembered that on the trial of the above stated cause, the following proceedings were had, to-wit:

The plaintiff offered in evidence from the answers to cross interrogatory No. 29 of the witness, W. O. Powers, who testified by deposition, alleged copies of the laws of 1880, purporting to have been passed by the old corporation known as Supreme Lodge, Knights of Pythias of the World, which said old corporation was chartered as shown by the pleadings and evidence in the year 1870, and whose charter expired by limitation in 1890, to the ad-

81 mission of which alleged copies of the laws of 1880, the defendant then and there objected for the following reasons, to-wit:

1. Because it had not been proven by the witness or by any other testimony in the case that the alleged copies of the laws of 1880, were the laws of the said old corporation, the testimony of the witness showing that the alleged copies of said laws offered in evidence were but copies of copies of what purported to be copies of the laws passed by said old corporation, and said purported or alleged copies offered in evidence were not shown to be the laws of said old corporation by any certificate of the custodian of said laws, or by copies of same, or by any other evidence legally admissible to show said alleged copies were true copies of said laws, the evidence showing that the witness, W. O. Powers, was not the custodian of the original laws passed by said old corporation, and that the alleged copies of said laws testified to by him were taken from purported copies of said laws in the office of the Insurance Department of the defendant corporation.

2. Because said laws were utterly immaterial and irrelevant in this case, it not being shown that this defendant corporation had assumed any obligations arising under said laws against the corporation purporting to have passed same, the pleadings and evidence in this case showing that this defendant corporation was not created until about fourteen years after the alleged passage of said laws.

3. Because the alleged copies of the laws of 1880 purporting to have been passed by the said old corporation chartered in 1870, and whose charter expired in 1890, were utterly immaterial and irrelevant, it being shown by the pleadings and evidence that

82 any certificate or certificates purporting to have been issued under said laws of 1880 were voluntarily surrendered and cancelled by agreement between the parties and a new certificate, the one sued on in this case, issued in the year 1885, and hence the laws of 1880 even if passed by said old corporation were immaterial and irrelevant to any rights which plaintiff may have had against said old corporation under said laws or against this defendant by reason of the passage of said laws by said old corporation the certificates issued under said laws having become nullified and cancelled by the voluntary agreement of the plaintiff in surrendering the certificates issued under said old laws, if same were issued, and accepting in lieu thereof a new certificate issued in 1885, or purporting to have been issued in 1885, which is the certificate sued on in this case.

4. Because it was not shown that this defendant corporation had assumed any obligations arising in favor of plaintiff under certificates or contracts purporting to have been issued under said laws of 1880, and because any rights which plaintiff may have had against this defendant must be determined under the laws of this defendant in force at the time and subsequent to the time of its incorporation, and particularly in force at the time the plaintiff became a member of this corporation, which was not and could not

have been prior to the year 1894 when this defendant was incorporated.

The court overruled the objections of the defendant, and permitted the plaintiff to read in evidence the alleged copies of the laws of 1880 shown in the statement of facts in this case, to which action of the court the defendant then and there in open court excepted, and now and here tenders this its bill of exception No. 6, and asks that the same be signed and approved by the Court, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This bill of exceptions examined, signed and approved, and ordered filed as a part of the record in the cause. This the — day of — A. D. 1913.

Judge 44th Judicial District of Texas.

For Bill of Exceptions No. 6.

The above bill approved, with the following qualification:

Counsel for defendant, in introducing their testimony, offered and introduced in evidence portions of the self-same laws of 1880, as referred to in this Bill of Exceptions. (See Statement of Facts, pp. 79 and 92).

E. B. MUSE,
Judge Presiding.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas, By C. H. Blewett Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, A. D. 1913.

S. MIMS,

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 7.

Be it remembered that on the trial of the above stated cause, the following proceedings were had:

84 The plaintiff offered in evidence the laws of 1884 purporting to have been passed by the old corporation chartered in 1870, and whose charter expired by limitation in 1890, defendant objected to the admission in evidence of said laws of 1884, and any and all laws of said old corporation, for the following reasons, to-wit:

1. Because there was no evidence or testimony showing the passage of said laws by said old corporation, either by showing certified

copy of same from the custodian of said laws, or by showing that the purported copies of said laws offered in evidence were examined and found to — correct copies of said laws, nor was the passage of said laws by said old corporation shown in any legal way.

2. Because said laws and particularly the laws purporting to have been passed by said old corporation in the year 1884 were immaterial and irrelevant and tended to establish no cause of action against this defendant, it not being shown by the evidence either (a) that this defendant had assumed or become responsible for any liabilities arising against said old corporation under said laws of 1884, or (b) that this defendant had any authority to assume any such liability or become responsible for any contract or certificate issued by said old corporation under said laws of 1884.

3. Because under the law any rights the plaintiff may have had against this defendant under or by virtue of any certificate or contract entered into between plaintiff in this case and said old corporation is and was governed by the laws of this defendant existing at and subsequent to the time of its incorporation and at and
85 subsequent to the time plaintiff became a member of this defendant corporation.

4. Because any rights plaintiff may have against this defendant on account of any certificate or contract issued by said old corporation under the laws of 1884 were and are barred by the statute of limitation of four or two years.

The court overruled defendant's objection and permitted the plaintiff to read in evidence purported copies of laws of 1884, and the other laws of the old corporation, and same were read in evidence and shown by the statement of facts to which reference is made for the copy of said laws so read in evidence, to which action of the court defendant then and there in open court excepted, and here and now tenders this bill of exceptions No. 7, and asks that same be signed and approved by the Court, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This bill of exceptions examined, signed and approved, and ordered filed as a part of the record in the cause. This the — day of —, A. D. 1913.

*Judge 44th Judicial
District of Texas.*

For Bill of Exceptions No. 7.

The foregoing Bill approved, with the following qualification:

Defendant's counsel introduced in evidence portions of the self-same laws of 1884, as referred to in the Bill. (See State-
86 ment of Facts, p. 93). And later plaintiff in closing his testimony, reintroduced the same laws of 1884 from the original pamphlet copy of same, as so produced by the defendants,

and from which defendants had so offered said portions at page 93 of the Statement of Facts.

E. B. MUSE,
Judge Presiding.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas,
by C. H. Blewett, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial
District, January Term, A. D. 1913.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 9.

Be it remembered that on the trial of the above stated cause the following proceedings were had:

Plaintiff in this case, S. Mims, being placed on the stand as a witness for plaintiff, the defendant on cross-examination asked the plaintiff whether or not it was a fact that when he joined the Order and took out his certificate he understood that he bound himself to pay his full share of whatever amount might be necessary to make all certificates held by member- in the class he joined good at maturity and if it were not a fact that he so understood his obligations? Plaintiff objected to said question and the answer of witness thereto, because the same was irrelevant, immaterial, and tended to prove no issue in this case. The Court sustained said objections of plaintiff and refused to permit the witness to answer the question. If the wit-

87 ness had been permitted to answer he would have testified that when he joined the Order and took out his certificate he did understand that he bound himself to pay to all the certificate holders and into the *bonds* of the society his full share of whatever amount might be necessary to make their certificates good at maturity, and that he so understood his obligations, to which action of the Court in sustaining the objection of plaintiff to the question and answer of said witness, defendant then and there in open court excepted, and here and now tenders this its bill of exception No. 9 and asks that same be signed and approved by the Court, which is accordingly done.

CRANE & CRANE,
H. P. BROWN,
Attorneys for Defendant.

This bill of exceptions examined, signed and approved, and ordered filed as a part of the record in the cause, this the — day of —, A. D. 1913.

Judge 44th Judicial District of Texas.

For Bill of Exception No. 9.

The above bill approved with the following qualification:

Plaintiff's counsel, in addition to the objections mentioned in the Bill to the introduction of said testimony, raised the further objection that the contract of the plaintiff was in writing, and that said testimony was taken to vary, alter, change or qualify said written contract; furthermore, the witness was allowed to testify as shown at pp. 55 and 56, Statement of Facts.

E. B. MUSE,
Judge Presiding.

88 Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas, By C. B. Blewett, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, A. D. 1913.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 10.

Be it remembered that on the trial of the above stated cause, the following proceedings were had:

Defendant offered in evidence the answer of the witness, S. H. Wolfe, taken by deposition to the interrogatory No. 19. Plaintiff objected to said answer because same was immaterial and irrelevant and tended to prove no issue in this case, and because the answer of said witness showed that it was merely a conclusion or opinion of said witness, and not a statement of facts. The Court sustained, plaintiff's objection to the question and answer of said witness, and refused to permit the defendant to read the answer of said witness in evidence. The answer of said witness so excluded by the court was as follows, to-wit:

"I have read and am familiar with the decision of the Court of Civil Appeals of the State of Texas in the case of Supreme Lodge Knights of Pythias vs. Neeley. I understand the rule therein laid down for measure of damages and method of arriving at amount of damages. In my opinion the Court held that the proper measure of damages when a life insurance policy is cancelled is the value of the policy when the cancellation takes place. In view of the
89 fact that the plaintiffs, Gill, Nicks and Mims, had been paying too little for their insurance, I am of the opinion that the value of their policies as laid down, in the decision above referred to is nothing. For many years the plaintiffs have been enjoying protections at the cost of the younger members of the Order, and it must be apparent, therefore, that they have no equity in the funds, which have been accumulated, but on the contrary were indebted to the Order at the beginning of 1900 for considerable sums.

In the case of S. Mims the indebtedness was at least \$1055. These results have been arrived at by placing on the side of the account the payments made by each of the three certificates holders, accumulated with interest, and placing on the other side the cost of insurance accumulated at the same result, and strike a balance."

The Court also sustained objections of the plaintiff above stated and refused to admit in evidence that portion of the testimony of said witness, S. H. Wolfe, above copied, beginning at the words "in view of the fact" and ending with the words "striking a balance," to all of which action and ruling of the court the defendant then and there in open court excepted, and here and now tenders this its bill of exception No. 10, and asks that the same be signed and approved by the court which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This bill of exception examined, signed and approved and ordered filed as a part of the record in the cause, this the — day of —, A. D. 1913.

90

_____,
Judge 44th Judicial District of Texas,

For Bill of Exceptions No. 10.

The foregoing Bill approved with the following qualification:

In addition to the objections raised by the plaintiff's counsel to the introduction of said testimony as mentioned in said Bill, Plaintiff's counsel raised the further objection that said testimony was an attempt by the witness to testify as to what would be the legal measure of damage, whereas such was a question of law, and to which the witness would not be allowed to testify or give his opinion or conclusion.

May 23, 1913.

E. B. MUSE,
Judge Presiding.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.
By C. H. Blewett Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, A. D. 1913.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 11.

Be it remembered that on the trial of the above stated cause the following proceedings were had:

The witness, Powers, being upon the stand, plaintiff asked said witness the following question whether or not any members trans-

ferred from the fourth to the fifth class when the fifth class was created, and how many members were transferred. The defendant objected to the question and answer of said witness to said question upon the following grounds, to-wit:

1. Because the fact that the members transferred from the fourth to fifth class when the fifth class was created, or the fact as to the number of members transferred from fourth to fifth class afforded no ground for the cause of action set up in plaintiff's petition against this defendant.

2. Because the evidence showing that the fifth class was an entirely separate and distinct class from the fourth class, and that no money of the fourth class or of the plaintiff in this case was paid into the fifth class fund, and that the rates in the fifth class were paid only by the members of the fifth class and out of said payments alone said fifth class fund was created, and that said notes were much higher than those paid by fourth class members and the evidence further showing that not one cent either of the mortuary fund created by the fourth class members or one cent of any fund paid by plaintiff went into the fifth class, any evidence in reference to the said fifth class as called for by said question or testified to by said witness was absolutely irrelevant, inadmissible and tended in no way to support any claim of plaintiff against this defendant in this case.

The court overruled defendant's objections and permitted said witness to testify in answer to said question as follows:

"Quite a number of members transferred from the fourth to fifth class when the fifth class was created. There were about fifty-five thousand members went from fourth to fifth class, carrying insurance of about eighty million dollars. None of the members who transferred from the fourth class into the fifth class carried with them into the fifth class the moneys that they had theretofore contributed to the fourth class funds. The mortuary fund of the fourth class remained to the credit of the members who remained in the fourth class. The fifth class have not one dollar of surplus except what was earned on last year's accounting and which is being apportioned among the members this year. The fifth class has something like three million dollars reserve fund."

To which action of the Court the defendant then and there excepted, and now and here tenders this its bill of exception No. 11 and asks that same be signed and approved, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

The bill of exceptions examined, signed and approved and ordered filed as a part of the record in the cause, this the — day of —, A. D. 1913.

E. B. MUSE,
Judge 44th Judicial District of Texas.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.
By C. H. Blewett Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, 1913.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 12.

Be it remembered that on the trial of the above stated cause the following proceedings were had:

- 93 The witness, W. O. Powers, being on the stand, plaintiff's attorney asked the said Powers as to the contents of the books of the defendant corporation, and as to whether or not it was not a fact, and was not shown by said books that the fifth class of the Insurance Department of the defendant, organized after the fourth class had accumulated a surplus of about three million dollars. The defendant objected to said question and answer of the said witness, first, because said testimony was wholly immaterial, it being shown that plaintiff was not a member of the fifth class of the Insurance Department, and had never been a member, and that plaintiff contributed nothing to that fund, and refused even to contribute anything to the fourth class fund after January 1st, 1911, and because the evidence showed further that the fact was that none of the members who transferred from the fourth class into the fifth class carried with them into the fifth class any moneys that they had theretofore contributed to the fourth class fund, the entire mortuary fund of the fourth class remaining to the credit of the members who remained in the fourth class, and because the evidence further showed that the fifth class had not one dollar of surplus except what was earned on last year's accounting, and because it was further shown by the evidence that the fifth and fourth classes were entirely separate and distinct classes, the fifth class members paying a much higher rate for their insurance than the fourth class members, and that neither plaintiff nor any member of the fourth class contributed one cent to the fund of the fifth class, or had any interest in said fund, and it being further
- 94 shown that the fourth and fifth classes and their funds were entirely separate and neither has any interest in the funds of the other class.

The Court overruled the defendant's objection, and permitted the witness to testify as follows, to-wit:

"The fifth class has something like \$3,000,000 reserve fund."

To which action of the Court the defendant then and there excepted and here and now tenders this its bill of exception No. 12, and asks that the same be signed and approved by the Court, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

The bill of exceptions examined, signed and approved and ordered filed as a part of the record in the cause. This the 23rd day of May, A. D. 1913.

E. B. MUSE,
Judge 44th Judicial District of Texas.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.
By C. H. Blewett Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District, January Term, 1913.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Bill of Exceptions No. 13.

Be it remembered that on the trial of the above stated cause the following proceedings were had:

95 After the defendant closed its testimony plaintiff offered to show by the deposition of the witness, W. O. Powers, the condition of the finances of the fifth class, to which testimony the defendant then and there in open court objected for the following reasons, to-wit:

1. Because it appears from the evidence and is a fact that the fifth class of the defendant's Insurance Department was a class to which the plaintiff did not belong, and to which fund he contributed nothing and because, it being shown that the Order at the time plaintiff entered it permitted the creation of different insurance classes, and the evidence showing that the plaintiff did not take out insurance in the fifth class, and the evidence further showing that he first obtained a certificate in the first and second classes, and later transferred to the fourth class, said testimony as to the fifth class was immaterial and tended to prove no issue in this case.

2. Because any evidence as to the condition of the finances of the fifth class would be utterly immaterial and tend to prove no issue in this case, there being no contention on the part of plaintiff and no evidence on his part, or in this record to show that plaintiff was a member of the fifth class, or that he contributed one cent to the funds of the fifth class, or that any fourth class member contributed anything to the funds of said fifth class or that any of the mortuary fund of the fourth class went into the fund of the fifth class, and it being further shown by the evidence that the moneys of the fifth class were derived from assessments paid
96 only by members of that class, which assessments were greatly in excess of the assessments paid by the plaintiff or any member of the fourth class into the fourth class fund.

The Court overruled defendant's objection and permitted the witness to testify as to the condition of the finances of the fifth class as shown by statement of facts as follows, to-wit:

Number of fifth class members August 31, 1910, 62379.

Amount of Insurance \$88,557,134.00.

Received from all sources fifth class 1/1/0 to 8/1/10, \$1,043,429.59.

Paid out in death losses, etc. 1/1/10 to 8/1/10 in fifth class, \$616,069.85.

Balance \$427,359.74.

Balance to the credit of the fifth class mortuary fund on July 31, 1910, was \$2,101,108.18.

In the fifth class for the month of July, 1910, assessments paid in from fifth class members were \$147,549.61.

Death losses were \$95,000.00."

To which action of the Court the defendant then and there in open court excepted and here and now tenders this its bill of exception No. 13, and asks that same be signed and approved by the Court, which is accordingly done.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

The Bill of exceptions examined, signed and approved and ordered filed as a part of the record in the cause. This the — day of —, A. D. 1913.

97

E. B. MUSE,
Judge 44th Judicial District of Texas.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.
By C. H. Blewett, Deputy.

No. 9290-B.

In the 44th Judicial District, Dallas County, Texas.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 1.

No. 1.

To the Honorable District Court of said District:

Defendant asks that the court instruct the jury as follows:

Gentlemen of the Jury: You are instructed that the certificate sued on is alleged to have been issued and executed by the Knights of Pythias of the World, a corporation that expired in 1890, and that there is no proof that the defendant corporation assumed its payment. You will therefore, find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 2.

98 To the Honorable District Court of said District:

In the event Special Charge No. 1 shall be refused, defendant asks the following:

Gentlemen of the Jury: You are instructed that there is no evidence that the old corporation which expired in 1890 executed the certificate sued on. No proof has been offered upon that point. You will, therefore, find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

No. 9290-B.

In the 44th Judicial District, Dallas County, Texas.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 3.

No. 111.

To the Honorable District Court of said District:

In the event Special Charges Nos. 1 and 11 shall be refused, defendant asks the following charge.

Gentlemen of the Jury: You are instructed to find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk, Dallas Co., Texas. By C. H. Blewett, Deputy.

99 In the 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S: MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 4.

No. IV.

To the Honorable District Court of said District:

In the event Special Charges Nos. 1, 11 & 111 shall be refused, defendant asks the following instruction:

GENTLEMEN OF THE JURY: You are instructed that the by-laws of the defendant authorize it to raise the rates of the members in its insurance department, and in the fourth class, should it become necessary to pay the death losses that may occur. You are instructed that if you believe from the evidence that it was necessary for the defendant to raise the rates in 1910 in order to be able to meet its obligations, that is to say to pay the death losses when they mature, and if you believe that the amount of the raised rates was only reasonably necessary for that purpose, you will find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 5.

100

No. V.

To the Honorable District Court of said District:

In the event that the first three Special Charges shall be refused defendant asks the following:

GENTLEMEN OF THE JURY: You are instructed that the plaintiff

and all those in the fourth class of the defendant's insurance department were mutual insurers of each other's lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay these certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 6.

No. VI.

To the Honorable District Court of said District:

In the event the first three special charges are not given
101 defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations, to the members of the fourth class, then you are instructed to find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge No. 7.

No. VII.

To the Honorable District Court of said District:

In the event the first three charges are refused, defendant
102 asks the Court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed in this case that any claim or demand the plaintiff may have had against this defendant would be a claim or demand arising, if at all, upon an implied obligation upon the part of the defendant, and not upon any written assumption or any liability to plaintiff by this defendant. If you believe, therefore, from the evidence that more than two years have elapsed since the alleged breach of defendant's agreement or contract with plaintiff, and before the filing of plaintiff's first amended original petition in this case, then you are instructed that plaintiff's claim would be barred by the statute of limitation of two years, and in such event you will return a verdict for defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

Refused:

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge, No. 8.

Special Charge No. 8.

To the Honorable District Court of said District:

Defendant asks the court to instruct the jury as follows:
103 In the event that all the instructions asked by the defendant from one to seven inclusive shall be refused:

GENTLEMEN OF THE JURY: If you believe from the evidence in this case that the old corporation known as the Supreme Lodge, Knights of Pythias of the World, issued the certificate sued on to plaintiff in this case, it being admitted in this case that the charter of said old corporation expired in the year 1890, and that from that time on until June 29th, 1894, no corporation existed, but an unincorporated society transacted business under the name of the Supreme Lodge, Knights of Pythias, and that the present defendant was incorporated on June 29th, 1894, and if you further believe from the evidence that said defendant, the new corporation, chartered in 1894, carried on the business formerly transacted by said old corporation, and said unincorporated society, and if you further believe from the evidence that plaintiff after the incorporation of the defendant continued to pay assessments on the certificate issued to him by said old corporation to the defendant corporation, and acquiesced in and obeyed to Jan. 1, 1911, the laws of defendant then you are instructed that plaintiff's rights against this defendant, and defendant's liabilities to plaintiff must be governed by the charter, constitution and laws of this defendant corporation, and the laws of said corporation existing and under which said corporation was doing business at the time and since its charter was obtained must govern and control the rights of plaintiff against said defendant, and if you believe from the evidence that said new corporation, the defendant in this case, was empowered under its charter, constitution and laws to re-rate its members as was done in this case, then you are instructed to find for the defendant.

H. P. BROWN,
CRANE & CRANE,
Attorneys for Defendant.

This charge was presented and refused after preemptory instructions for pl'ff had been given.

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In 44th Judicial District, Dallas County, Texas.

No. 9290-B.

S. MIMS
vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Special Charge, No. 9.

To the Honorable District Court:

Defendant respectfully asks the Court to instruct the jury as follows; in the event that special charges Nos. 1, 2 & 3 asked by the defendant be refused:

GENTLEMEN OF THE JURY: If you believe from the evidence in this case that the old corporation known as Supreme Lodge, Knights of Pythias of the World issued the certificate* sued on in this case to plaintiff, and if you further believe from the evidence that after the expiration of the charter of said old corporation in 1890, the unincorporated society which began business or carried on the business of the old corporation did not in writing assume the payment of the obligations or contracts of said old corporation, then
 105 you are instructed to find for the defendant.

H. P. BROWN,
 CRANE & CRANE,
Attorneys for Defendant.

This charge was presented after the court had refused peremptory instruction of def't and given peremptory instruction of pl'ff.

E. B. MUSE, *Judge.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas. By C. H. Blewett, Deputy.

In the 44th District Court, Dallas County, Texas.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Charge of Court and Verdict.

GENTLEMEN OF THE JURY: You are instructed to return a verdict for the plaintiff in the amount of Three Thousand Six Hundred Sixty-three and 35/100 Dollars (\$3663.35).

E. B. MUSE, *Judge Presiding.*

The above charge respectfully requested.

THOS. F. WEST,
 L. C. McBRIDE,
Attorneys for Plaintiff.

We, the jury find for the plaintiff in the sum of \$3663.35.
 (Signed)

J. G. MOFFITT, *Foreman.*

Filed March 14, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.

SATURDAY, March 15th, 1913.

Entered as of March 14th, 1913.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Judgment.

106 This cause came on to be heard at the present term of court on March 11th, 1913, both parties appeared in person and by their attorneys, and announced ready for trial. Then came on to be heard defendants' general demurrer and special exceptions to plaintiff's petition, and the court after hearing the argument thereon is of the opinion that the law is against the defendant. It is therefore, ordered, adjudged and decreed by the court that the said general demurrer and all of the special exceptions contained in said defendants' amended original answer last filled be and the same are hereby overruled, to which said order and ruling defendant then and there in open court excepted. Then came on to be heard plaintiff's exceptions presented by supplemental petition to defendants' answer, and the court after hearing same, and the argument of counsel thereon, is of the opinion that the law is against plaintiff on said exceptions, and that they should be overruled. It is therefore ordered, adjudged and decreed by the court that said exceptions contained in plaintiff's supplemental petition to defendants' amended answer last filed upon which trial was had be and the same are hereby overruled, to which said order and ruling plaintiff then and there in open court excepted.

Whereupon defendant presented its demurrer and exceptions to the allegations in plaintiff's supplemental petition, and the court having heard same is of the opinion that the law is against the said defendant thereon, and that the demurrer and exceptions, both general and special, contained in said defendants' supplemental answer should be overruled, and it is therefore ordered, adjudged and decreed by the Court that the same be, and they are hereby overruled, to which ruling defendant then and there in open court excepted.

Whereupon a jury was empanelled consisting of J. G. Moffitt and eleven others, and the cause proceeded to trial, and the jury after having heard the pleadings and the evidence, and the plaintiff having asked a peremptory instruction for a verdict for the plaintiff in the sum of Three Thousand Six Hundred and Sixty-three and 35/100 Dollars, and the Court having given same, the jury upon such instruction returned in to open court their verdict as follows, to-wit:

"We, the jury, find for the plaintiff in the sum of \$3663.35.

J. G. MOFFITT, Foreman."

which verdict was thereupon in all things approved by the court. It is therefore, ordered, adjudged and decreed by the Court that judgment should be rendered in favor of the plaintiff for the sum as set forth in said verdict.

It is accordingly ordered, adjudged and decreed that plaintiff, S. Mims, do have and recover of and from the defendant, Supreme Lodge Knights of Pythias, a corporation, the sum of Three Thousand Six Hundred and Sixty-three and 35/100 (\$3663.35) Dollars, together with six per cent thereon from the date of this judgment, and all costs in this suit and for the enforcement of this judgment let execution issue.

108 In the District Court of Dallas County, Texas, for the 44th Judicial District.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Defendant's Amended Motion for New Trial.

To the Honorable Judge of said Court:

Now at this time comes the defendant, Supreme Lodge, Knights of Pythias, and with leave of the court files this its first amended motion for a new trial, and for amendment says:

I.

That the court erred in not determining that he was disqualified to try the case against the defendant, it being shown that he was a demitted Knight, and still under the jurisdiction of the defendant, Supreme Lodge, Knights of Pythias, all of which will be fully shown by bill of exceptions No. 1.

II.

The court erred in permitting the witness, W. O. Bowers, to testify by deposition to the contents of the by-laws copies of which were attached to his said answers and particularly those portions authorizing a raise in rates complained of by plaintiff in his petition, because he was not the custodian of said laws, and for other reasons, all of which will more fully appear by reference to bill of exceptions No. 2.

III.

The court erred in permitting the answer of the witness, W. O. Powers, to cross-interrogatory No. 7 to be read to the jury in that the answer showed that he was not the custodian of the original records of the Supreme Lodge, Knights of Pythias, also that the

109 copies he had exhibited with his answers were not pretended to be examined copies, or certified to by the custodian of the records of defendant, and further because the copies that he proposed to attach were not shown by him to be exact copies of the original laws of the Lodge; that they were not certified copies, certified to by the keeper or custodian of these records, nor were they shown to be examined copies, all of which will more fully appear by bill of exception No. 3.

IV.

The court erred in permitting the plaintiff to read in evidence the two certificates, one being in the first class, and the other in the second class, both of date April 30th, 1879, issued by the corporation which was created in 1870, and expired by its terms in 1890, because they were not charged to have been issued by the defendant, and their execution was not proven, nor was it shown that the defendant corporation had assumed the obligations thereby imposed and because no corporation can assure the debts of a previous corporation without authority of law for so doing, and there was nothing in the act creating defendant corporation that authorized it to assume the debts of the previous corporation, and because it was further shown that these old certificates in 1879 were surrendered by voluntary agreement of the parties as shown by the pleadings, and new certificates issued in 1885 in lieu thereof; that all rights under the old certificates were absolutely destroyed by the agreement to cancel same and accept a new certificate in their stead; all of which will more fully appear by bill of exceptions No. 4.

V.

110 The court erred in permitting the plaintiff to read in evidence certificate No. 4183 issued May 29th, 1885, for the reason that it was purported to have been issued by the corporation created in 1870, and which expired by its own limitation in 1890, and because it was not charged to have been issued by the defendant corporation, and because it had not been proven that its liability thereby imposed had been assumed by the defendant corporation, nor was it shown that defendant corporation had the authority to assume same, and because the execution of said certificates purported to have been issued May 29th, 1885, (it being the one upon which this suit is based) had not been proven, and because the plaintiff has not offered in connection therewith the written obligation upon which the latter certificate was issued, all of which will be more fully shown by bill of exceptions No. 5.

VI.

The court erred in permitting the plaintiff to introduce from the answer to cross interrogatory No. 29, of the witness, W. O. Powers, alleged copies of the laws of 1880, passed by the old corporation known as Knights of Pythias of the World, because same had not been proven to be the laws of the old Knights of Pythias corpora-

tion, and because they were utterly immaterial, as it was not shown that defendant corporation had assumed any obligation thereof, inasmuch as it was not created until fourteen years after the passage of said laws all of which will more fully appear by reference to bill of exceptions No. 6.

VII.

111 The court erred in permitting any part of the laws of the old corporation to be proven for the reasons stated in the preceding paragraph, that the same were not passed by the defendant corporation, and because defendant corporation had assumed no obligations of the old corporation, and because it was shown that defendant corporation did not have authority to assume old obligations because the defendant corporation could not be bound thereby; all of which will more fully appear from bill of exceptions No. 7.

VIII.

The Court erred in permitting the laws of 1884 passed by the old corporation to be introduced in evidence by the plaintiff in that they were in no part or no sense the act of defendant corporation, and in that they were wholly insufficient to bind the defendant corporation as fully shown by bill of exception No. 8.

IX.

The court erred in not permitting the defendant on cross examination to prove by the plaintiff that when he joined the Order and took out his certificate, he understood that he bound himself to pay to all the certificate holders his full share of whatever amount might be necessary to make their certificates good at maturity, and that he so understood his obligation, as will more fully appear from bill of exception No. 9.

X.

112 The court erred in excluding answer No. 19 of the deposition of witness, Wolfe, because said answer distinctly showed that the certificate of the plaintiff upon which suit was brought would have been utterly worthless unless the rates had been raised, of which raise plaintiff made complaint in his petition; all of which will more fully appear from bill of exception No. 10.

XI.

The court erred in permitting the plaintiff's counsel on cross examination to prove by the witness, Powers, that many persons left the fourth class, of which plaintiff was a member, and joined what is known as the fifth class, and that thereby the membership of the fourth class was reduced, because that afforded no ground for a cause of action against defendant; all of which will be shown by bill of exception No. 11.

XII.

The court erred in permitting plaintiff to prove by the witness, Powers, by parol the contents of the books of defendant corporation by undertaking to show and showing that the fifth class of the Insurance Order, organized after the fourth class, had accumulated a surplus of about Three Million Dollars, because said testimony was wholly immaterial, it being shown that plaintiff contributed nothing to that fund, and refused even to contribute anything to the fourth class fund of which he seeks by this suit to be a beneficiary, all of which will be shown by bill of exception No. 12.

XIII.

The court erred, after the defendant closed its testimony, in permitting plaintiff to offer depositions as to the condition of the finances of the fifth class, it being a class to which plaintiff did not belong, and to which fund he contributed nothing, it being fully shown that the Order at the time plaintiff entered it permitted the creation of different insurance classes, and his certificate showed that he had first taken one in the first and second classes, and later transferred both to the fourth class; all of which will be shown by bill of exceptions No. 13.

XIV.

The Court erred in refusing special charge No. 1 asked by defendant, which was in words and figures, substantially, as follows:

"You are instructed that the certificate sued on is alleged to have been issued and executed by the Knights of Pythias of the World, a corporation which expired in 1890, and that there is no proof that the defendant corporation assumed its payments. You will, therefore, find for the defendant."

XV.

The court erred in refusing special charge No. 2 asked by the defendant, which is in substance as follows:

"In the event special charge No. 1 shall be refused, defendant asks the following:

You are instructed that there is no evidence that the old corporation which expired in 1890 executed the certificate sued on. No proof has been offered upon that point. You will, therefore, find for the defendant."

XVI.

The court erred in refusing special charge No. 3 asked by defendant, which was in words and figures substantially as follows:

"Gentlemen of the Jury: You are instructed to find for the defendant."

XVII.

The court erred in refusing special charge No. 4 asked by the defendant, which was in words and figures as follows:

"In the event special charges Nos. 1, 2 and 3 shall be refused, defendant asks the following instruction:

Gentlemen of the Jury: You are instructed that the by-laws of the defendant authorize it to raise the rates of the members in its insurance department, and in the fourth class, should it become necessary to pay the death losses that may occur. You are instructed that if you believe from the evidence that it was necessary for the defendant to raise the rates in 1910 in order to be able to meet its obligations, that is to say to pay the death losses when they mature, and if you believe that the amount of the raised rates was only reasonably necessary for that purpose, you will find for the defendant."

XVIII.

The Court erred in refusing special charge No. 5 asked by the defendant, which was substantially as follows:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each other's lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay those certificates as they matured they had the implied power to increase the rates to
115 such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant."

XIX.

The court erred in refusing special charge No. 6 asked by defendant, which was substantially as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations, to the members of the fourth class, then you are instructed to find for the defendant."

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XX.

The court erred in refusing special charge No. 7 asked by the defendant, which was substantially as follows:

"In the event the first three charges are refused, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed in this case that any claim or demand the plaintiff may have had against this defendant would be a claim arising, if at all, upon an implied obligation upon the part of the defendant, and not upon any written assumption of any liability to plaintiff by this defendant. If you believe, therefore, from the evidence that more than two years have elapsed since the alleged breach of defendant's agreement or contract with plaintiff, and before the filing of plaintiff's first amended original petition in this case, then you are instructed that plaintiff's claim would be barred by the statute of limitation of two years, and in such event you will return a verdict for defendant."

XXI.

The court erred in refusing special charge No. 8 asked by the defendant, which was substantially as follows:

"Defendant asks the court to instruct the jury as follows in the event that all the instructions asked by defendant from one to seven inclusive shall be refused:

Gentlemen of the Jury: If you believe from the evidence in this case that the old corporation known as the Supreme Lodge, 117 Knights of Pythias of the World, issued the certificate sued on to plaintiff in this case, it being admitted in this case that the charter of said old corporation expired in the year 1890, and that from that time on until June 29th, 1894, no corporation existed, but an unincorporated society transacted business under the name of the Supreme Lodge, Knights of Pythias, and that the present defendant was incorporated on June 29th, 1894, and if you further believe from the evidence that said defendant, the new corporation, chartered in 1894, carried on the business formerly transacted by said old corporation, and said unincorporated society, and if you further believe from the evidence that plaintiff after the incorporation of the defendant continued to pay assessments on the certificate issued to him by said old corporation to the defendant corporation, and acquiesced in and obeyed to Jan. 1, 1911, the laws of defendant, then you are instructed that plaintiff's rights against this defendant, and defendant's liabilities to plaintiff must be governed by the charter, constitution and laws of this defendant corporation, and the laws of said corporation existing and under which said corporation was doing business at the time and since its charter was obtained must govern and control the rights of plaintiff against said defendant, and if you believe from the evidence that said new corporation, the defendant in this case, was empowered under its charter, constitution and laws to re-rate its members as was done in this case, then you are instructed to find for the defendant."

The court erred in refusing special charge No. 9, asked by the defendant, which in substance was as follows:

"Defendant respectfully asks the court to instruct the jury as follows, in the event that special charges Nos. 1, 2, and 3, shall be refused:

Gentlemen of the Jury: If you believe from the evidence in this case that the old corporation known as Supreme Lodge, Knights of Pythias of the World issued the certificate sued on in this case to plaintiff, and if you further believe from the evidence that after the expiration of the charter of said old corporation in 1890, the unincorporated society which began business or carried on the business of the old corporation did not in writing assume the payment of the obligations or contracts of said old corporation, then you are instructed to find for the defendant."

XXIII.

The court erred in peremptorily instructing a verdict for plaintiff in the sum of Three Thousand Six Hundred and Sixty-three and 35/100 (\$3,663.35) Dollars, as fully shown by peremptory instruction marked "given" by the Court, and the judgment of the Court, because the evidence showed conclusively,

(a) That defendant corporation did not issue the obligation sued on,

(b) That defendant corporation did not assume the obligation sued on,

(c) That defendant corporation was without power to assume the obligation sued on.

(d) That defendant corporation received no assets of any
119 kind or character, either from the old corporation which expired in 1890, or from the incorporated society operating for four years previous to the organization of defendant corporation,

(e) That there was no evidence upon which to base an instruction of any kind or character authorizing the jury to find a verdict against defendant corporation for money received and expended by the old corporation from 1879 to 1890 inclusive, with interest thereon, it being shown as hereinbefore stated that defendant corporation received none of the money thus collected and received no benefit therefrom,

(f) That the evidence wholly fails to authorize any verdict against defendant for any moneys collected by the unincorporated society, because the evidence showed without contradiction that defendant corporation received none of said money, and assumed no obligation to repay same, the only obligation that could have been said to have been assumed would be to carry out the insurance contract with plaintiff for the consideration paid to this defendant, said insurance contract to be considered according to the by-laws of defendant corporation, the only laws that gave the

defendant corporation authority to issue insurance certificates, and which said by-laws authorized the defendant corporation to raise and increase rates to any extent that might be necessary to enable it to meet its obligations. And because all cause of action against the unincorporated society was barred by the statutes of limitation long before the institution of this suit.

(g) That it was impossible to pay the face of plaintiff's certificate with the rates existing before the last raise, of which plaintiff complains, and the evidence further shows that all the certificates of the fourth class were obligations on the membership of the said fourth class, and that plaintiff — as much bound to see that the other members' certificates were paid as they were to see that his was paid, and the fourth class having no funds except such as could be raised by assessments or rates fixed by the organization, it was the only means to which it could resort to enable it to carry out its contracts.

(h) That the charge of the court in the face of the evidence last above mentioned was tantamount to declaring that the law required defendant corporation to pay all of its obligations, and yet denied it the power to collect the means by which those obligations could be paid; and because the construction thus placed on said contract permitted plaintiff, after he had ascertained by experience that the rates fixed for his insurance were too low, and after he had ascertained that the only way by which it and others like it could be paid at maturity was to increase the rates, and then after these rates were increased for that purpose and a fund thereby accumulated that he would be permitted to withdraw from said class and take more money than he could have obtained by remaining in the insurance department until his death and paying all of his dues.

XXIV.

The court erred in giving said peremptory instruction for the following additional reasons:

(i) Because the instruction of the court and the verdict of the jury enabled plaintiff to recover more by his wrongful course now than the beneficiary in his policy would have been entitled to, or could have obtained at his death had he proceeded to pay the raised rates.

(j) Because the evidence is wholly insufficient to justify the court in instructing the jury to recover nearly seven hundred (\$700.00) dollars more than the face of the certificate had the contract been carried out in every particular.

(k) Because under the charter, constitution and laws of the old corporation and plaintiff's application and certificate made with same, if same was made, and under the constitution and laws of the unincorporated society and plaintiff's express or implied contract, if any, under the evidence in this case with said unincorporated society, and particularly under the charter, constitution and by-laws of this defendant corporation and plaintiff's obligations to it, and its obligations to him if any, plaintiff was bound and his

contract or claim governed by all laws enacted subsequent to the issuance of his certificate sued on in this case, and adopted by either the old corporation or unincorporated society, or this defendant, and particularly was plaintiff bound by and his rights or claim is against defendant governed by the constitution, rules, laws and regulations of this defendant existing at the time it was chartered and subsequent thereto, and hence plaintiff was not entitled to recover in this case.

(l) Because the court in the event plaintiff was entitled to recover anything against this defendant erred in placing the measure of plaintiff's damages at the amount for which he instructed the jury to find for the plaintiff against this defendant, the law ap-
122 plication to the facts in this case being that in no event could plaintiff recover more than the consideration with interest thereon paid by him to this defendant after the date of its incorporation, the said sums so paid being the only consideration as shown by the evidence, received by this defendant under any contract, agreement or understanding, expressed or implied, by which this defendant could be obligated to carry out any contract of insurance plaintiff had either with the old corporation or unincorporated society or this defendant.

(m) Because the measure of damages fixed by the court in said peremptory instruction is not the correct measure of damages under the law applicable to the facts in this case, the correct measure being the value of the policy sued on if the rates had not been increased.

(n) Because under the law applicable to the facts in this case any claim of plaintiff against this defendant would be and is barred by the statute of limitation of two years.

(o) Because under the law applicable to the facts of this case, the evidence showed that plaintiff surrendered all previous certificates issued to him in 1885 and received in lieu thereof the certificate sued on, plaintiff could not recover of defendant any amount paid on said surrendered and cancelled certificates.

Wherefore, defendant prays that the verdict of the jury be set aside and a new trial be granted it, for which it will ever pray, etc.

CRANE & CRANE,
H. P. BROWN,
Attorneys for Defendant.

SATURDAY, March 29, 1913.

March 29, 1913.

No. 9290-B.

S. MIMS

VS.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Order Overruling Motion for New Trial.

On this the 29th day of March, 1913, the motion for a new trial coming on to be heard the defendant with leave of the court filed its amended motion for a new trial, then the said amended motion for a new trial coming on to be heard both parties announced ready, the Court after hearing same and the argument thereon is of the opinion that the law is against said motion; it is therefore ordered, adjudged and decreed by the court that the said amended motion for a new trial filed by defendant be and the same is hereby overruled, to which ruling and action of the court the defendant then and there in open court excepted and gave notice of appeal to the Honorable Court of Civil Appeals of the Fifth Supreme Judicial District of Texas at Dallas.

It is further ordered that the defendant be and is hereby allowed twenty days from and after the 5th day of April, 1913, for the preparation of and filing of Bills of Exceptions and Statement of Facts in this cause.

FRIDAY, May 9th, 1913.

No. 9290-B.

S. MIMS

VS.

SUPREME LODGE, K. OF P.

Extending Time.

124 On this the 9th day of May A. D. 1913, came on to be heard motion of the defendant in the above styled and numbered cause, to enlarge and extend the time for the preparation and filing of statement of facts and bills of exception and it appearing to the court that goods cause exists for the enlargement and extension of said time, it is therefore, ordered, adjudged and decreed by the court that said defendant's motion be granted, and that the defendant's time for the preparation and filing of statement of facts and bills of exception be and the same is hereby enlarged and extended until and including the 20th day of May A. D. 1913.

THURSDAY, April 24th, 1913.

No. 9290-B.

S. MIMS,

vs.

SUPREME LODGE, K. OF P.

Extending Time.

On this 24th day of April A. D. 1913, came on to be heard motion of the defendant in the above styled and numbered cause, to enlarge and extend the time for the preparation and filing of statement of facts and bills of exception therein, and it appearing to the court that good cause exists for the enlargement and extension of said time, it is, therefore, ordered, adjudged and decreed by the court that said defendant's motion be granted, and that the defendant's time for the preparation and filing statement of facts and bills of exception in the above styled cause, be and the same is hereby enlarged and extended until and including the 10th day of May, A. D. 1913.

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TUESDAY, May 20th, 1913.

No. 9290-B.

S. MIMS,

vs.

SUPREME LODGE, K. OF P.

Extending Time.

On this the 20th day of May A. D. 1913, came on to be heard motion of the defendant in the above styled and numbered cause, to enlarge and extend the time for the preparation and filing of statement of facts and bills of exception, and it appearing to the court that good cause exists for the enlargement and extension of said time, it is therefore, ordered, adjudged and decreed by the court that said defendant's motion be granted, and that the defendant's time for the preparation and filing of statement of facts and bills of exception be and the same is hereby enlarged and extended until and including the 25th day of May, A. D. 1913.

No. 9290-B.

In the 44th Judicial District Dallas County, Texas.

S. MIMS,

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Supersedeas Bond.

Whereas, in the above styled and numbered cause, pending in the District Court of Dallas County, Texas, and at a regular term

of said Court, to-wit; on the 14th day of March, A. D. 1913, the said S. Mims, plaintiff in said cause, recovered judgment against defendant, Supreme Lodge, Knights of Pythias, a corporation, in the sum of Three Thousand Six Hundred and Sixty-three and 35/100 (\$3663.35) Dollars, with interest thereon at the rate of six per cent per annum from date of said judgment, together

126 with all costs of suit; and,

Whereas, thereafter on the 29th day of March, A. D. 1913, motion theretofore filed by said Supreme Lodge, Knights of Pythias, defendant, praying for a new trial, was overruled, to which action of the court said Supreme Lodge, Knights of Pythias then and there excepted and gave notice of appeal to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Texas, and from which judgment and order said Supreme Lodge, Knights of Pythias has taken an appeal to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas, Dallas County, Texas, and desires to suspend execution of said judgment during the pendency of said appeal.

Now, therefore, we Supreme Lodge, Knights of Pythias, a corporation, as principal, and National Surety Company and —, as sureties, acknowledge ourselves bound to pay to said S. Mims, the sum of Eighty-five Hundred (\$8500.00) Dollars, conditioned that said Supreme Lodge, Knights of Pythias, a corporation, appellant, shall prosecute its appeal with effect, and in case judgment of the Supreme Court or of the Court of Civil Appeals shall be against it, shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it.

Witness our hands this 9th. day of April, 1913.

SUPREME LODGE, KNIGHTS OF PHYTHIAS,

By M. M. CRANE, *Its Agent and Attorney in Fact.*

NATIONAL SURETY COMPANY,

By C. H. VERSCHOYLE, *Attorney-in-fact.*

[SEAL.]

127 I fix the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court and cou-t below at Two Hundred & Fifty & 00/100 Dollars, and approve the foregoing bond this 9th day of April, A. D. 1913.

H. H. WILLIAMS,

Clerk District Dallas County, Texas.

By S. M. SPEAKE, *Deputy.*

[SEAL.]

Filed April 9, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas,
By S. M. Speake, Deputy.

In the District Court of Dallas County, Texas, for the 44th Judicial District.

No. 9290-B.

S. MIMS,

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS.

Assignments of Error.

Now at this time comes the defendant, Supreme Lodge, Knights of Pythias, and files this its assignments of errors.

I.

The court erred in not determining that he was disqualified to try the case against the defendant, it being shown that he was a demitted Knight, and still under the jurisdiction of the defendant, Supreme Lodge, Knights of Pythias, all of which is fully shown by bill of exception No. 1.

This assignment of error is based on the first subdivision in defendant's amended motion for a new trial.

II.

The court erred in permitting the witness, W. O. Powers, to testify by deposition to the contents of by-laws, copies of which were attached to his said answers, and particularly those portions authorizing a raise in rates complained of by plaintiff in his petition, because he was not the custodian of said laws, and for other reasons.

This assignment of error is based on the second subdivision in defendant's amended motion for a new trial.

III.

The Court erred in permitting the answer of the witness, W. O. Powers, to cross-interrogatory No. 7 to be read to the jury in that the answer showed that he was not the custodian of the original records of the Supreme Lodge, Knights of Pythias, also that the copies that he exhibited with his answers were not pretended to be examined copies, or certified to by the custodian of the records of defendant, and further because the copies that he proposed to attach were not shown by him to be exact copies of the original laws of the Lodge; that they were not certified copies, certified to by the keeper or custodian of those records, nor were they shown to be examined copies.

This assignment of error is based on the third subdivision in defendant's amended motion for a new trial.

IV.

The court erred in permitting the plaintiff to read in evidence the two certificates, one being in the first class, and the other in the second class, both of the date April 30, 1879, issued by the corporation which was created in 1870, and expired by its terms in 1890, because they were not charged to have been issued by the defendant, and their execution was not proven, nor was it shown that the defendant corporation had assumed the obligations thereby imposed; and because no corporation can assume the debts of a previous corporation without authority of law for so doing, and there was nothing in the act creating defendant corporation that authorized it to assume the debts of the previous corporation, and because it was further shown that these old certificates in 1879 were surrendered by voluntary agreement of the parties as shown by the pleadings, and new certificate in lieu thereof issued in 1885, and that all rights under the old certificates were absolutely destroyed by the agreement to cancel same and accept a new certificate in their stead; all of which is more fully shown by bill of exception No. 4.

This assignment of error is based on the fourth subdivision of defendant's amended motion for a new trial.

V.

The court erred in permitting the plaintiff to read in evidence certificate No. 4183 issued May 29th, 1885, for the reason that it was purported to have been issued by the corporation created in 1870, and which expired by its own limitation in 1890, and because it was not charged to have been issued by the defendant corporation, and because it had not been proven that its liability thereby imposed had been assumed by the defendant corporation, nor was it shown that defendant corporation had the authority to assume same, and because the execution of said certificate purported to have been issued May 29th, 1885, (it being the one upon which this suit is based), had not been proven, and because the plaintiff has not offered in connection therewith the written obligation upon which the latter certificate was issued, all of which is more fully shown by bill of exception No. 5.

This assignment of error is based on the fifth subdivision of defendant's amended motion for a new trial.

VI.

The court erred in permitting the plaintiff to introduce from the answer to cross interrogatory No. 29 of the witness, W. O. Powers, alleged copies of the laws of 1880, passed by the old corporation known as Knights of Pythias of the World, because same had not been proven to be the laws of the old Knights of Pythias corporation, and because they were utterly immaterial, as it was not shown that defendant corporation had assumed any obligation thereof, inasmuch as it was not created until fourteen years after

the passage of said laws, all of which is more fully shown by reference to bill of exception No. 6.

This assignment of error is based on the sixth subdivision of defendant's amended motion for a new trial.

VIII.

The court erred in permitting any part of the laws of the old corporation to be proven for the reasons stated in the preceding paragraph, that the same were not passed by the defendant corporation, and because defendant corporation had assumed no obligations of the old corporation, and because it was shown that defendant corporation did not have authority to assume old obligations because the defendant corporation could not be bound thereby; all of which is more fully shown by bill of exception No. 7.

131 This assignment of error is based on the seventh subdivision of defendant's amended motion for a new trial.

VIII.

The court erred in permitting the laws of 1884 passed by the old corporation to be introduced in evidence by the plaintiff in that they were in no part or no sense the act of defendant corporation, and in that they were wholly insufficient to bind the defendant corporation, as fully shown by bill of exception No. 8.

This assignment of error is based on the eighth subdivision of defendant's amended motion for a new trial.

IX.

The court erred in not permitting the defendant on cross examination to prove by the plaintiff that when he joined the Order and took out his certificate, he understood that he bound himself to pay to all the certificate holders his full share of whatever amount might be necessary to make their certificates good at maturity, and that he so understood his obligation, as is more fully shown by bill of exception No. 9.

This assignment of error is based on the ninth subdivision of defendant's amended motion for a new trial.

X.

The court erred in excluding answer No. 19 of the deposition of witness, Wolfe, because said answer distinctly showed that the certificate of the plaintiff upon which suit was brought would have been utterly worthless unless the rates had been raised, of which raise plaintiff made complaint in his petition; all of which is more fully shown in bill of exception No. 10.

152 This assignment of error is based on the tenth subdivision of defendant's amended motion for a new trial.

XI.

The court erred in permitting the plaintiff's counsel on cross-examination to prove by the witness, Powers, that many persons left the fourth class, of which plaintiff was a member, and joined what is known as the fifth class, and that thereby the membership of the fourth class was reduced, because that afforded no ground for a cause of action against defendant; all of which is fully shown by bill of exception No. 11.

This assignment of error is based on the eleventh subdivision of defendant's amended motion for a new trial.

XII.

The court erred in permitting plaintiff to prove by the witness, Powers, by parol the contents of the books of defendant corporation by undertaking to show and showing that the fifth class of the insurance order, organized after the fourth class, had accumulated a surplus of about Three Million Dollars, because said testimony was wholly immaterial, it being shown that plaintiff contributed nothing to that fund, and refused even to contribute anything to the fourth class fund, of which he seeks by this suit to be a beneficiary; all of which is fully shown by bill of exception No. 12.

133 This assignment of error is based on the twelfth subdivision of defendant's amended motion for a new trial.

XIII.

The court erred, after the defendant closed its testimony, in permitting plaintiff to offer depositions, as to the condition of the finances of the fifth class, it being a class to which plaintiff did not belong, and to which fund he contributed nothing, it being fully shown that the Order at the time plaintiff entered it permitted the creation of different insurance classes, and his certificate showed that he had first taken one in the first and second classes, and later transferred both to the fourth class; all of which is fully shown by bill of exception No. 13.

This assignment of error is based on the thirteenth subdivision of defendant's amended motion for a new trial.

XIV.

The court erred in refusing special charge No. 1 asked by defendant, which was in words and figures, substantially, as follows:

"You are instructed that the certificate sued on is alleged to have been issued and executed by the Knights of Pythias of the World, a corporation which expired in 1890, and that there is no proof that the defendant corporation assumed its payments. You will, therefore, find for the defendant."

This assignment of error is based on the fourteenth subdivision of defendant's amended motion for a new trial.

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XV.

The court erred in refusing special charge No. 2 asked by the defendant, which is in substance as follows:

"In the event special charge No. 1 shall be refused, defendant asks the following:

You are instructed that there is no evidence that the old corporation which expired in 1890 executed the certificate sued on. No proof has been offered upon that point. You will, therefore, find for the defendant."

This assignment of error is based on the fifteenth subdivision of defendant's amended motion for a new trial.

XVI.

The court erred in refusing special charge No. 3 asked by defendant, which was in words and figures substantially as follows:

"Gentlemen of the Jury: You are instructed to find for the defendant."

This assignment of error is based on the sixteenth subdivision of defendant's amended motion for a new trial.

XVII.

The court erred in refusing special charge No. 4, asked by the defendant, which was in words and figures as follows:

"In the event special charges Nos. 1, 2 and 3 shall be refused, defendant asks the following instruction:

Gentlemen of the Jury: You are instructed that the by-laws of the defendant authorizes it to raise the rates of the members in
135 its insurance department, and in the fourth class, should it become necessary to pay the death losses that may occur. You are instructed that if you believe from the evidence that it was necessary for the defendant to raise the rates in 1910 in order to be able to meet its obligations, that is to say to pay the death losses when they mature, and if you believe that the amount of the raised rates was only reasonably necessary for that purpose, you will find for the defendant."

This assignment of error is based on the seventeenth subdivision of defendant's amended motion for a new trial.

XVIII.

The court erred in refusing special charge No. 5 asked by the defendant, which was substantially as follows:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each other's lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay those certificates as they matured, they had the implied power to increase the rates to such

point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant."

136 This assignment of error is based on the eighteenth subdivision of defendant's amended motion for a new trial.

XIX.

The court erred in refusing special charge No. 6 asked by defendant, which was substantially as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations, to the members of the fourth class, then you are instructed to find for the defendant."

This assignment of error is based on the nineteenth subdivision of defendant's amended motion for a new trial.

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XX.

The court erred in refusing special charge No. 7 asked by the defendant, which was substantially as follows:

"In the event the first three charges are refused, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed in this case that any claim or demand the plaintiff may have had against this defendant would be a claim or demand arising, if at all, upon an implied obligation upon the part of the defendant, and not upon any written assumption of any liability to plaintiff by this defendant. If you believe, therefore, from the evidence that more than two years have elapsed since the alleged breach of defendant's agreement or contract with plaintiff, and before the filing of plaintiff's first amended original petition in this case, then you are instructed that plaintiff's claim would be barred by the statute of limitation of two years, and in such event you will return a verdict for defendant."

This assignment of error is based on the twentieth subdivision of defendant's amended motion for a new trial.

XXI.

The court erred in refusing special charge No. 8 asked by the defendant, which was substantially as follows:

"Defendant asks the court to instruct the jury as follows in the event that all the instructions asked by defendant from one to seven inclusive, shall be refused:

138 Gentlemen of the Jury: If you believe from the evidence in this case that the old corporation known as the Supreme Lodge, Knights of Pythias of the World, issued the certificate sued on to plaintiff in this case, it being admitted in this case that the charter of said old corporation expired in the year 1890, and that from that time on until June 29th, 1894, no corporation existed, but an unincorporated society transacted business under the name of the Supreme Lodge, Knights of Pythias, and that the present defendant was incorporated on June 29th, 1894, and if you further believe from the evidence that said defendant, the new corporation, chartered in 1894, carried on the business formerly transacted by said old corporation, and said unincorporated society, and if you further believe from the evidence that plaintiff after the incorporation of the defendant continued to pay assessments on the certificate issued to him by said old corporation to the defendant corporation, and acquiesced in and obeyed to Jan. 1, 1911, the laws of defendant, then you are instructed that plaintiff's rights against this defendant, and defendant's liabilities to plaintiff must be governed by the charter, constitution and laws of this defendant corporation, and the laws of said corporation existing and under which said corporation was doing business at the time and since its charter was obtained must govern and control the rights of plaintiff against said defendant, and if you believe from the evidence that said new corporation, the defendant in this case, was empowered under its charter, constitution and laws to re-rate its members as was done in this case, then you are instructed to find for the defendant."

139 This assignment of error is based on the twenty-first subdivision of defendant's amended motion for a new trial.

XXII.

The court erred in refusing special charge No. 9, asked by the defendant, which in substance was as follows:

"Defendant respectfully asks the court to instruct the jury as follows in the event that special charges Nos. 1, 2 and 3 shall be refused:

Gentlemen of the Jury: If you believe from the evidence in this case that the old corporation known as Supreme Lodge, Knights of Pythias of the World issued the certificate sued on in this case to plaintiff, and if you further believe from the evidence that after the expiration of the charter of said old corporation in 1890, the unincorporated society which began business or carried on the business of the old corporation did not in writing assume the payment of the obligations or contracts of said old corporation, then you are instructed to find for the defendant."

This assignment of error is based on the twenty-second subdivision of defendant's amended motion for a new trial.

XXIII.

The court erred in peremptorily instructing a verdict for plaintiff in the sum of Three Thousand and Six Hundred and Sixty-three and 35/100 (\$3,663.35) Dollars, as fully shown by peremptory instruction marked "Given" by the Court, and the judgment of the court, because the evidence showed conclusively,

(a) That defendant corporation did not issue the obligations sued on,

(b) That defendant corporation did not assume the obligation sued on,

(c) That defendant corporation was without power to assume the obligation sued on,

(d) That defendant corporation received no assets of any kind or character, either from the old corporation which expired in 1890, or from the unincorporated society operating for four years previous to the organization of defendant corporation.

(e) That there was no evidence upon which to base an instruction of any kind or character authorizing the jury to find a verdict against defendant corporation for money received and expended by the old corporation from 1879 to 1890 inclusive, with interest thereon, it being shown as hereinbefore stated that defendant corporation received none of the money thus collected and received no benefit therefrom.

(f) That the evidence wholly fails to authorize any verdict against defendant for any moneys collected by the unincorporated society, because the evidence showed without contradiction that defendant corporation received none of said money, and assumed no obligation to repay same, the only obligation that could have been said to have been assumed would be to carry out the insurance contract with plaintiff for the consideration paid to this defendant, said insurance contract to be considered according to the by-laws of defendant corporation, the only laws that gave the defendant corporation authority to issue insurance certificates, and which said

by-laws authorized the defendant corporation to raise and increase rates to any extent that might be necessary to enable it to meet its obligations. And because all cause of action against the unincorporated society was barred by the statutes of limitation long before the institution of this suit.

(g) That it was impossible to pay the face of plaintiff's certificate with the rates existing before the last raise, of which plaintiff complains, and the evidence further shows that all the certificates of the fourth class were obligations on the membership of the said fourth class, and that plaintiff was as much bound to see that the other members' certificates were paid as they were to see that his was paid, and the fourth class having no funds except such as could be raised by assessments or rates fixed by the organization, it was

the only means to which it could resort to enable it to carry out its contracts.

(h) That the charge of the court in the face of the evidence last above mentioned was tantamount to declaring that the law required defendant corporation to pay all of its obligations, and yet denied it the power to collect the means by which those obligations could be paid; and because the construction thus placed on said contract permitted plaintiff, after he had ascertained by experience that the rates fixed for his insurance were too low, and after he had ascertained that the only way by which it and others like it could be paid at maturity was to increase the rates, and then after these rates were increased for that purpose, and a fund thereby accumulated, he would be permitted to withdraw from said class and take more
142 money than he could have obtained by remaining in the insurance department until his death and paying all of his dues.

This assignment of error is based on the twenty-third subdivision of defendant's amended motion for a new trial.

XXIV.

The court erred in giving said peremptory instruction for the following additional reasons, to-wit:

(i) Because the instruction of the Court and the verdict of the jury enabled plaintiff to recover more by his wrongful course now than the beneficiary in his policy would have been entitled to, or could have obtained at his death had he proceeded to pay the raised rate.

(j) Because the evidence is wholly insufficient to justify the Court in instructing the jury to recover nearly seven hundred (\$700.00) dollars more than the face of the certificate had the contract been carried out in every particular.

(k) Because under the charter, constitution and laws of the old corporation and plaintiff's application and certificate made with same, if same was made, and under the constitution and laws of the unincorporated society and plaintiff's express or implied contract, if any, under the evidence in this case with said unincorporated society, and particularly under the charter, constitution and by-laws of this defendant corporation and plaintiff's obligations to it, and its obligations to him, if any, plaintiff was bound, and his contract or claim governed by all laws enacted subsequent to the issuance of his certificate sued on in this case, and adopted by
143 either the old corporation or unincorporated society, or this defendant, and particularly was plaintiff bound by and his rights or claims against defendant governed by the constitution, rules, laws and regulations of this defendant existing at the time it was chartered and subsequent thereto, and hence plaintiff was not entitled to recover in this case.

(l) Because the court in the event plaintiff was entitled to recover anything against this defendant, erred in placing the measure of plaintiff's damages at the amount for which he instructed the jury

to find for the plaintiff against this defendant, the law applicable to the facts in this case being that in no event could plaintiff recover more than the consideration with interest thereon paid by him to this defendant after the date of its incorporation, the said sums so paid being the only consideration as shown by the evidence, received by this defendant under any contract, agreement or understanding, expressed or implied, by which this defendant could be obligated to carry out any contract of insurance plaintiff had either with the old corporation or unincorporated society or this defendant.

(m) Because the measure of damages fixed by the court in said peremptory instruction is not the correct measure of damages under the law applicable to the facts in this case, the correct measure being the value of the policy sued on, if the rates had not been increased.

(n) Because under the law applicable to the facts in this case any claim of plaintiff against this defendant would be and is barred by the statute of limitation of two years.

144 (o) Because under the laws applicable to the facts of this case, the evidence showed that plaintiff surrendered all previous certificates issued to him in 1885 and received in lieu thereof the certificate sued on, plaintiff could not recover of defendant any amounts paid on said surrendered and cancelled certificates.

This assignment of error is based on the twenty-fourth subdivision of defendant's amended motion for a new trial.

XXV.

The court erred in overruling defendant's amended motion for a new trial for all the reasons therein stated, and particularly because the evidence was wholly insufficient to justify a peremptory instruction in favor of the plaintiff, and was wholly insufficient to support a verdict in favor of plaintiff and against defendant for the following reasons, to-wit:

(1) There was no evidence that the old corporation of Knights of Pythias of the World executed the certificate sued on.

(2) There was no evidence that the new corporation created, June, 1894, assumed the indebtedness of the old corporation which expired in 1890.

(3) Because there is no evidence that the new corporation, defendant herein, is liable by contract or otherwise for the sum of money for which the court instructed the jury to find a verdict against the defendant.

(4) Because if the defendant is liable for anything to the plaintiff it could only be for such sums of money as were paid to it
145 by the plaintiff, and as against most of these payments, if not all, the statute of limitation was a complete defense.

(5) Because under the terms of defendant's charter no recovery could be had by pl'ff in this case.

CRANE & CRANE,
H. P. BROWN,
Attorneys for Defendant.

Filed May 23, 1913, H. H. Williams, Dist. Clerk Dallas Co., Texas.
By S. T. Jackson, Deputy.

146

Bill of Costs.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, KNIGHTS OF PYTHIAS (a Corporation).

Bill of Costs in District Court.

Fil. and Doc. Pet.....	.35
Steno fee.....	3.00
Iss cit & 2 copies & 2 copies of pet, 7 p. ea.....	8.75
W. M. Rea Sh'ff of Tarrant Co. ret on cit (pd).....	.85
Fil Waiver & Ent, app.....	.30
Def't. demands jury.....	.75
Jury fee paid by def't.....	5.00
Fil Int. of pl'ff to W. O. Powers & U. B. Hunt.....	.15
Fil. D. Int. to ".....	.15
Fil X Int. to ".....	.15
Iss. com. to W. B. Powers.....	.75
Filing notice to produce certain papers.....	.15
Service of notice waived.....	.15
Fil & Dock mo. for cost.....	.30
Cont by consent.....	.20
Geo. A. Denny, Nty.....	17.50
Fil & Doc. mo. for cost.....	.30
Fil am. pet.....	.15
Fil. Sup. pet.....	.15
Ent. leave to am.....	.75
" " " ".....	.75
Fil am. Ans.....	.15
Fil cost bond.....	.15
Sw. 7 emp. Jury.....	.35
Fil am. pet & am. ans.....	.30
Sw 1 wit.....	.10
" 1 ".....	.10
Pl'ff may amend.....	.75
Def't " ".....	.75
Fil Chg. of court.....	.15
Fil 9 spec. chgs.....	1.35
Rec. & Rec. Verdict.....	.35
Fil and doc mo. for new trial.....	.30
Ent. Judgment.....	1.25
Taxing cost.....	.25
Fil am. mo. for new trial.....	.15
Mo. for new trial overruled.....	.75

Fil and appr supersedeas & Appeal Bond.....	1.65
Fil & Doc. mo. for extension of time.....	.30
Ent. order for time.....	.75
Fil and doc mo. for time.....	.30
Mo. for time sustained .....	.75
Fil & Doc. Mo. for ex. of time.....	.30
Ent. order on " " " .....	.75
Filing assignment of errors.....	.15
Fil 2 steno reports.....	.30
Fil Bills of Ex. #1-4-5-6-7-9-10-11-12 & 13.....	1.50
" " " 1-2-3-4.....	.60
Making transcript	60.00

147

Clerk's Certificate.

THE STATE OF TEXAS

*County of Dallas:**District Clerk's Certificate.*

I, H. H. Williams, Clerk of District Courts within and for the County of Dallas, Texas, do hereby certify that the above and foregoing 146 pages contain a true and correct transcript of all the proceedings had in cause No. 9290-B, styled S. Mims vs. Supreme Lodge, Knights of Pythias (a corporation.

Given under my official signature and the seal of office, at Dallas, Dallas County, Texas, this the 16th day of June, A. D. 1913.

H. H. WILLIAMS,

Clerk District Courts, Dallas County, Texas.

By S. T. JACKSON,

Deputy.

148 In the District Court, Dallas County, Texas, 44th Judicial District. January Term, A. D. 1913.

No. 9290-B.

S. MIMS

vs.

SUPREME LODGE, K. OF P.

Statement of Facts.

Be it remembered, That upon the trial of the above entitled and numbered cause the following testimony was introduced and the following proceedings had:

Counsel for plaintiff introduced in evidence the following portion of the deposition of the witness W. O. POWERS:

"My name is W. O. Powers, my age is 36; my residence is Indian-

apolis, Indiana and my occupation is General Secretary of the Insurance Department Knights of Pythias. I am the general Secretary and have held such office since November 15, 1910.

"It is the duty of the General Secretary to keep and have charge of the books and records of the Board, to receive all funds and deposit the same daily in the proper depository. He shall sign all checks drawn to liquidate the accounts of the Insurance Department, which shall have been countersigned by the Auditor. He shall conduct the general correspondence with Section Secretaries and members, and prepare and present to the Executive Committee all claims against the Insurance Department. He shall also
149 perform such other services as are required of him by the Supreme Statutes, or as may be specifically required of him by the Board of Control.

"I am acquainted with the books and records of this office, having been employed in the offices since 1903 and the books and records have been, and are, accurately kept.

"I came to this Society in July 1903. During the following year I conducted the correspondence with Section secretaries pertaining to differences between their remittances and the records of the office. I later took up the work in the Certificate Department and about that time made a complete checking of the records as to whether or not they were paying a proper rate considering the occupation they were following. I also had charge of the Death Claims Department and in addition to getting the claims in proper form to be submitted to the Executive Committee for approval, drew all checks in payment of such claims.

"I later had charge of the Statistical work of the office and following that had entire charge of the accounts with the Superintendents.

"Just prior to assuming the duties of my present position I was in charge of the Department which comprised the following:

Certificate Department.

Statistical Department.

Valuation and Accounting Records.

Correspondence pertaining to these matters.

Superintendent Accounts, and had charge of Re-rating of the members on January 1, 1911.

"Since November 15, 1910, I have occupied the position of General Secretary and it is my duty to keep and have charge of the books and records of the Board of Control, to receive all funds and
150 deposit the same daily in the proper depository. I am required to sign all checks drawn to liquidate the accounts of the Insurance Department, which shall have been countersigned by the Auditor. I conduct the general correspondence with the Section Secretaries and members, and prepare and present to the Executive Committee all claims against the Insurance Department. I also perform such other services as are required by the Supreme Statutes or as may be specifically required by the Board of Control.

"Am also a member of the Executive Committee which passes

on all matters which may properly come before it during the interim of the meetings of the Board of Control.

"We have on file true and correct copies of all Constitutions and Laws pertaining to this (the insurance) Department of the Order since the date of its institution.

"The insurance department Knights of Pythias was organized October, 1877, under the caption of Endowment Rank. It originally had two classes designated as First Class and Second Class, the members of the First Class holding one thousand dollar certificates and members of the Second Class holding two thousand dollar certificates.

"For a number of years no medical examination was required, a certificate of the good health of the applicant being accepted, and all members paid equal assessments, regardless of age or occupation.

"In 1880 the Supreme Lodge provided for a Third Class, composed of members between the ages of fifty and sixty and limited to \$1,000 of insurance.

151 "A membership fee of \$3.00 accompanied each application for one class, two dollars of same to be paid to the Supreme Master of the Exchequer, one dollar for the Expense Fund and one dollar for the Endowment Fund—the remaining one dollar to be retained in the treasury of the section for general expense. If the application was for both classes three dollars, and if for all three classes, five dollars was sent to the S. M. of E. Any member could belong to either or all of the classes but no member could hold two memberships in the same class.

"These three classes were established on what was known as the Post-mortem Plan of assessment insurance, that is, the death loss for any given month was ascertained, and assessments were levied sufficient to pay same. These assessments were not graded according to the ages of the members or the risks that they imposed, but were equal upon all the members carrying an equal amount of insurance.

"The laws provided that if on the payment of a death claim, a sum sufficient to meet the next maturing claim did not remain to the credit of the mortuary fund, then in that event the S. M. of E. should call another assessment of one dollar from each member for the Mortuary Fund and twenty five cents for the Expense Fund.

"At the end of each quarter the excess over Two Hundred Dollars in the expense fund was transferred to the Mortuary. At the Supreme Lodge meeting held in July, 1879, the expense dues were decreased from twenty five cents to ten cents and this with the initiation fees still created a surplus in which was carried to the Mortuary Fund of each class.

152 "The Fourth Class was established in 1884 and the assessment plan supplanted by the Ante-mortem plan most of the members transferring to this class. Members were assessed on a graded system of assessments, based upon the expectancy of life."

Plaintiff introduced the following statement from the deposition of W. O. Powers, of the monthly payments made by the plaintiff under the several benefit certificates hereinafter mentioned.

S. Mims. Cert. No. 4183. Sec. #198. Amount of Insurance \$3,000.00.

Paid in 1st. and 2d Class. \$201.00
Paid in Fourth Class;

1885	.....	28.80
86	.....	43.20
87	.....	43.20
88	7 mos. at \$3.60	25.20
88	5 mos. at \$4.50	22.50
89	12 mos. at "	54.00
90	12 " " "	54.00
91	12 " " "	54.00
92	13 " " "	58.50
93	12 " " "	54.00
94	2 " " "	9.00
94	10 " " "	46.50
95	12 " " "	55.80
96	12 " " "	55.80
97	12 " " "	55.80
98	12 " " "	55.80
99	12 " " "	55.80
1900	12 " " "	55.80
01	8 " " "	37.20
01	1 " " Special	4.65
01	4 " " 7.35	29.40
02	12 " " "	88.20
03	12 " " "	88.20
04	12 " " "	88.20
05	12 " " "	88.20
06	12 " " "	88.20
07	12 " " "	88.20
08	12 " " "	88.20
09	12 " " "	88.20
09	2 " Specials at 7.35	14.70
10	12 " " " 7.35	88.20
10	3 " " " 7.35	22.05
Total Amount paid		1,930.50

39 months	at \$3.60	140.40
68	" " 4.50	206.00
91	" " 4.65	423.15
117	" " 7.35	859.95
Paid prior to trans. to 4th Cl.		201.00
		1,930.50

153 Counsel for plaintiff then introduced the following additional from the deposition of the witness W. O. POWERS:

"S. Mims became a member of the first and second class on April 11th, 1879. Was a member of those classes for 73 months. Transferred to the 4th Class in May 1885.

"Assuming the nearest birthday of S. Mims on January 1, 1911 to be 74 years, there were 95 members at that age carrying insurance to the extent of \$220,000.00.

"The Order of Knights of Pythias has over 7,000,000 members and only about 70,000 of these are members of its Insurance Department.

"I attach hereto a true and correct copy of the Laws of the Endowment Rank issued in August 1880.

"At the time S. Mims became a member of the first and second classes there were but the two classes. The third class was established in 1880.

"In August 1910 the business of the Department was divided into four classes, viz:

First Class.

Second Class.

Fourth Class and Fifth Class.

"The first two classes have but very few members and are not now in active operation, no members having been admitted to same since 1884.

"The Charter of the Supreme Lodge, Knights of Pythias of the World expired in 1890. From this time to June 29, 1894, the Supreme Lodge Knights of Pythias was without a charter. On June 29, 1894, by special act of Congress the "Supreme Lodge Knights of Pythias" was incorporated. (Copy of Articles of Association
154 and Incorporation attached hereto marked cross int. 16.)"

Counsel for the plaintiff introduced in evidence Certificate of incorporation of the Supreme Lodge Knights of Pythias, recorded August 5th, 1870, as follows:

"Whereas, it is deemed advisable to have the Supreme Lodge Knights of Pythias, an incorporated body under the laws of the Congress of the United States, for the more perfect working of the beneficent intentions of the said Order.

"And whereas, with a view to promote this object, and as Grand and Subordinate Lodges of the said Order have been formed or organized in various other states and territories, and will be hereafter formed in various other states and territories of the United States as well as foreign countries.

1. "Now, therefore, be it known, that in accordance with the Act of Congress entitled "An Act to provide for the creation of corporations in the District of Columbia by General Law," approved May 5th, 1870, the undersigned having associated themselves for the purpose and with the design of establishing and creating the corporation to be known and named the Supreme Lodge Knights of Pythias, do hereby make and authorize to be filed in the office of the Register of Deeds, in the District of Columbia, this Certificate and

these Articles of Association for the government of themselves, their associates, assigns and successors.

2. "And be it further known, that the beneficial association of which this is the certificate, shall be known as the Supreme Lodge of the Knights of Pythias, the seal of which has been copy-
155 righted by the Supreme Recording and Corresponding Scribe in the Clerk's office of the Supreme Court of the District of Columbia.

3. "And be it further known, That Joseph T. K. Plant, Past Supreme Chancellor; Clarence M. Barton of the District of Columbia; Venerable Supreme Patriarch Wilber H. Meyers of Pennsylvania; Supreme Chancellor Samuel Read, of New Jersey; Supreme Vice Chancellor C. L. Russell, of Ohio; Supreme Banker W. A. Porter, of Pennsylvania; Supreme Guide John F. Comstock, of Connecticut; Supreme Inner Steward H. Clay Lloyd of Kentucky; Supreme Outer Steward George H. Crager, of Nebraska; Past Supreme Chancellor Edward Dunn; Past Grand Chancellor Harry Kronheimer, J. R. N. Curtin, Francis Woods, Hugh G. Devine, Joseph S. Martin of the District of Columbia, together with all Past Grand Chancellors of each and every state, territory or jurisdiction, now organized or hereafter to be organized under the authority of this Supreme Lodge shall constitute from and after the filing of this Certificate as aforesaid, "The Supreme Lodge of Knights of Pythias of the World."

4. "And be it further known, That the Board of Trustees of said Supreme Lodge Knights of Pythias (who shall be elected annually) shall consist of Joseph T. K. Plant, Clarence M. Barton, Edward Dunn, Joseph S. Martin, Francis Wood, Harry Kronheimer and Hugh G. Devine, who shall serve until the election of their successors at the Annual Session of the Supreme Lodge Knights of Pythias in April 1871, and shall serve without pay.

5. "And be it further known: That no contract for the disbursement of the moneys of the said Supreme Lodge shall be valid
156 and of effect until ratified by the Board of Finance or Financial Committee.

6. "And be it further known, That the officers of the said Supreme Lodge Knights of Pythias of the World, shall consist of Venerable Supreme Patriarch, Supreme Chancellor, Supreme Vice Chancellor, Supreme Recording and Corresponding Scribe, Supreme Banker, Supreme Guide, Supreme Inner Steward, Supreme Outer Steward, all of whom shall be selected by ballot every alternate year, on the first day of the session of said Supreme Lodge, and the said Supreme Recording and Corresponding Scribe and Supreme Banker shall give such security for the faithful performance of their duty as may be ordered by said Supreme Lodge.

7. "And be it further known, That the said Supreme Lodge shall hold an annual session for the transaction of all business for the benefit and welfare of the Order, and that the Supreme Chancellor may, and on the call of fifteen Past Grand Chancellors, or Past Supreme Chancellors, shall convene the Supreme Lodge at any time business may demand, and all of the said annual sessions shall be held in such city or town as the Supreme Lodge may determine upon

at a regular session; provided all special or called sessions shall be held in the City of Washington, D. C.

8. "And be it further known, That a representative from a majority of the Grand Lodges working under the jurisdiction of this Supreme Lodge shall constitute a quorum for the transaction of business.

9. "And be it further known, That the said Supreme Lodge shall have power to alter and amend its Constitution and By-laws at will, and that it shall have power to prescribe modes of initiation, etc., for the working of said Order, and no grand or subordinate Lodges, purporting to be Knights of Pythias, shall have legal standing unless chartered by or through the regularly elected officers of this Supreme Lodge, in regular or called session, or by the Supreme Chancellor during the recess of said Supreme Lodge.

"In witness whereof, We, the undersigned officers and members of the Supreme Lodge of Knights of Pythias of the World have hereunto affixed our names and seals this the fifth day of August A. D. 1870.

JOSEPH T. K. PLANT.	[SEAL.]
FRANCIS WOOD.	[SEAL.]
CLARENCE M. BARTON.	[SEAL.]
HUGH G. DEVINE.	[SEAL.]
EDWARD DUNN.	[SEAL.]
JOS. S. MARTIN.	[SEAL.]
H. KRONHEIMER.	[SEAL.]

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, R. H. Marsh, a Justice of the Peace in and for said County and District, do hereby certify that Thos. T. K. Plant, Clarence M. Barton, Edward D. Dunn, H. Kronheimer, Francis Wood, Hugh G. Devine, Jos. S. Martin, personally appeared before me in said District and acknowledged the signing of the same to be their voluntary act for the purpose therein set forth.

Witness My hand and seal this the fifth day of August, 1870.

[SEAL.]

R. H. MARSH, J. P.

Supreme Lodge K. of P's Association, D. C. Recorded August 5th, 1870, 12 M. Liber 1, fol. 75 et seq. "Acts of Incorporation," office of the Recorder of Deeds, District of Columbia, U. S. A."

Counsel for plaintiff introduced in evidence the following Special Act of Congress, approved June 29, 1894, incorporating Supreme Lodge, Knights of Pythias, in connection with the following report of committee, as taken from the official Journal of the Supreme Lodge, Knights of Pythias at its 18th Convention in August and September, 1894:

"Incorporation of the Supreme Lodge.

The special committee on incorporation of the Supreme Lodge (Jour. 1892, p. 6256) submitted the appended report, which was ordered to lie on the table and be printed:

Document 118:

To the Supreme Lodge Knights of Pythias:

Your committee on incorporation, after careful examination of the facts and the law relative to the incorporation of the Supreme Lodge, found that the charter theretofore granted had expired by limitation of time, and being unanimously of the opinion that, considering the greatness of the order and the magnitude of the business transacted by the Supreme Lodge, it was for the best interests of the order that the "Supreme Lodge, Knights of Pythias" be legally incorporated, and believing it meet that this American Order be recognized by the Congress of the United States, prepared an act of incorporation, which was thereafter passed by the Congress of the United States and on the 29th day of June, approved, which said act as passed and approved is as follows:

Public — No. 96.

An Act to incorporate the Supreme Lodge of the Knights of Pythias.

159 Be it Enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled:

That George B. Shaw, of the City of Eau Claire, State of Wisconsin; William W. Blackwell, of the City of Henderson, State of Kentucky; Walter B. Richie, of the City of Lima, State of Ohio; Robert L. C. White, of the City of Nashville, State of Tennessee; Philip T. Colgrove, of the City of Hastings, State of Michigan, and Tracy R. Bangs, of the City of Grand Forks, State of North Dakota, officers and members of the Supreme Lodge Knights of Pythias, and their successors, be and they are hereby incorporated and made a body politic and corporate in the District of Columbia, by the name of "The Supreme Lodge Knights of Pythias," and by that name it may sue and be sued, plead and be impleaded, in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and privileges incidental to fraternal and benevolent corporations within the District of Columbia.

"SEC. 2. That the said corporation shall have the power to take and hold real and personal estate, not exceeding in value one hundred thousand dollars, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation.

"§53. 3. That all claims, accounts, debts, things in action of other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned
160 in Section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided, that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.

"SEC. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state.

"SEC. 5. That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.

"SEC. 6. That Congress may at any time amend, alter or repeal this act. Approved June 29th, 1894."

Chapter 1634—An Act, to amend an act to Incorporate the Supreme Lodge of the Knights of Pythias.

Be i- enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled:

That Section two of an act approved June twenty-ninth eighteen hundred and ninety four, entitled "An Act to Incorporate the Supreme Lodge of the Knights of Pythias," be and the same is hereby amended by striking out the words "not exceeding in value one hundred thousand dollars," so that said section two shall read as follows:

That the said corporation shall have the power to take and hold
161 real and personal estate, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation.

SEC. 2. That this Act shall take effect from and after its passage and approval; Provided, That said corporation shall not hold or own real estate of the aggregate value of one million dollars at any time.

Approved February 26, 1907.

(United States Statutes at Large, 59th Congress, 1905-7. Vol. 34, Part 1, page 934).

This last mentioned amendment (of Feb. 26, 1907) was introduced in evidence by defendant instead of by plaintiff.

Counsel for defendant upon request and notice from plaintiff's counsel produced the originals of the following certificates, Nos. 5385 and 7869, and the applications of the plaintiff thereto attached for transfer into the Fourth Class, and said certificates and applications for transfer were then introduced by plaintiff and were as follows:

"No. 5383.

Certificate of Membership

Endowment Rank of the Order of Knights
of Pythias.

This certifies, that Brother S. Mims, Jr. has received the endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission

162 fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of One Thousand Dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided, however, that if at the time of the death of the said Brother S. Mims, Jr. there shall be less than One Thousand Members in this Class, there shall only be paid a sum equal to One Dollar for each member in good standing in this Class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In Witness Whereof, We have hereunto subscribed our names and annexed the seal of the Supreme Lodge Knights of Pythias of the World.

(Signed)

D. B. WOODRUFF,
Supreme Chancellor.

(Attest)

JOSEPH DOWDALL,
Supreme Keeper of Records.

163 Issued this the 30th day of April 1879. P. P. XVI at Indianapolis, Indiana, and registered in Bo-k 1 Folio 132.

(Signed)

JOHN B. STUMPH,
Supreme Master of Exchequer."

"No. 7869. Certificate of Membership. Second Class.
\$2,000.00.

Endowment Rank.

Of the Order of Knights of Pythias.

This certifies, That Brother S. Mims, Jr. has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this Rank now in force, or that may hereafter be enacted, and shall be in good standing under said Laws, the sum of Two Thousand Dollars Will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims as directed by said Brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master of Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided however, that if at the time of the death of said Brother S. Mims, Jr. there shall be less than Two Thousand members in this Class, there shall only be paid a sum equal to One Dollar for each member in good standing in this class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In Witness Whereof, We have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

(Signed)

D. B. WOODRUFF,

Supreme Chancellor.

(Attest)

JOSEPH DOWDALL,

Supreme Keeper of Records and Seal.

Issued this 30, day of April 1879. P. P. XVI, at Indianapolis, Indiana, and registered in Book 1 Folio 193.

(Signed)

JOHN B. STUMPH,

Supreme Master of Exchequer."

Counsel for the plaintiff introduced in evidence said applications and transfer to Fourth Class, as follows:

"GALV. May 7, 1885.

To Halvor Nelson, Sup' Sec'y of the Endowment Rank, K. of P.:

The undersigned, born on the 6th day of June, 1837, a member in good standing of Section No. 278, Endowment Rank, K. of P.,

and holding certificate No. 5383 in 1st class, which is hereto attached, hereby make application to enter the Fourth Class, in which I desire to hold an Endowment of One Thousand Dollars, and I hereby surrender all my right, title and interest in and to the within certificate, the benefit upon my death to be paid as follows: to my wife, Mary J. Mims.

165 (Signed) S. MIMS, *Applicant.*

I hereby certify that brother S. Mims is a member in good standing of Section No. 278 E. R. K. of P., and of Humboldt Lodge No. 9 located at Galveston, State of Texas.

(Signed) P. J. WREN, *Secretary."*

GALVESTON, May 7, 1885.

"To Halvor Nelson, Sup. Sec'y of the Endowment Rank, K. of P.:

The undersigned, born on the 6th day of June, 1837, a member in good standing of Sec. no. —, Endowment Rank K. of P., and holding Certificate No. 7869 in Second Class, which is hereto attached, hereby make application to enter the Fourth Class, in which I desire to hold an Endowment of Two Thousand Dollars, and I hereby surrender all my right, title and interest in and to the within Certificate, the benefit upon my death to be paid as follows: to my wife, Mary J. Mims.

(Signed) S. MIMS, *Applicant.*

I hereby certify that Bro. S. Mims is a member in good standing of Sec. No. 278 E. R., K. of P., and of Humboldt Lodge No. 9 located at Galveston, State of Texas.

(Signed) P. J. WREN, *Secretary."*

Counsel for the plaintiff offered in evidence Certificate of Membership No. 4183 issued May 29, 1885, as follows:

Certificate of Membership.

"No. 4183.

Fourth Class. \$3000.00.

166 Endowment — of the Order of Knights of Pythias.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the Certificates heretofore held by him in 1st and 2nd Classes for cancellation, as requested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good

standing under said laws the sum of Three Thousand Dollars will be paid by the Supreme Lodge Knights of Pythias of the World to Mary J. Mims, wife as directed by said Brother in his Application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this Certificate.

Provided, however, that if at the time of the death of said Brother, one monthly payment to the Endowment Fund by members holding an equal amount of Endowment, shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding equal amount of Endowment. And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this Certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In Witness Whereof, We have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

(Signed)

JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,
Supreme Keeper of Records and Seal.

Issued this 29 day of May 1885.

P. P. XXII at Washington, District of Columbia, and registered in Book 1, Folio 84.

(Signed)

HALVOR NELSON,
Supreme Secretary."

Counsel for the plaintiff introduced in evidence the following sections from the Amendments of the Supreme Statutes affecting the Insurance Department of the Knights of Pythias enacted by the Supreme Lodge of the defendant at the Biennial Convention of August 2, 1911, as follows: (Sections 468 and 509 enacted to go into effect October 8, 1910, and Section 479 enacted to go into effect October 8, 1910):

"Section No. 468. To the end that every certificate in the Fourth Class of the Insurance Department shall upon maturity be paid in full according to the tenor thereof, the Supreme Lodge enacts and declares that:

"(a) Each applicant for membership in the Fourth Class in the Insurance Department shall, upon completion of his application for transmission to the Board, pay to the Secretary of the Section or other duly authorized representative of said Board, a membership fee of fifty cents for each \$500.00 of benefit applied for and shall

pay in accordance with his age, occupation and the amount of benefit applied for a monthly payment as provided in the table herein, and if accepted, such member shall continue to pay the same amount (less the membership fee) each month thereafter in accordance with the laws governing the Insurance Department unless otherwise provided for by enactments of the Supreme Lodge.

"(b) Every member of the Fourth Class of the Insurance Department at the time when this statute takes effect and who continues his membership until December 31, 1910, shall pay a monthly payment for each month thereafter, beginning with the month of January A. D. 1911, monthly payments in accordance with his attained age and occupation and the amount of benefit provided for in his certificate, on January 1, A. D. 1911, as fixed by the table herein unless and until otherwise provided by enactments of the Supreme Lodge.

"(c) The following table represents gross rates covering the amounts of both mortuary and expense elements, and are on one thousand dollars of Insurance. Payments on certificates in the sum of \$500.00 shall be one half of the following rates except where the last figure of the rate is 5. In cases of this kind the rates shall be one half the scheduled rates plus 2-1/2 cents. Rates on \$2,000.00, \$3,000.00, \$4,000.00, and 5,000.00 of insurance shall be 2, 3, 4 and 5 times the scheduled rates respectively.

"In the case of members following occupations or employments graded as hazardous or extra hazardous they shall pay in addition to the amount required under the table the amount required by reason of such grading. The first column gives the age applicable in the case of the new member to his age at nearest birthday at the day of admission, and to the present member who continues his membership until said January 1, A. D. 1911, his attained age on said date. The second column gives the amount of each monthly payment applicable to each respective age.

"Table of Monthly Payments Per \$1,000.00.

21	\$1.40	44	\$2.75	67	\$7.75
22	1.45	45	2.80	68	8.20
23	1.50	46	2.90	69	8.65
24	1.50	47	3.00	70	9.15
25	1.55	48	3.15	71	9.70
26	1.60	49	3.50	72	10.30
27	1.60	50	3.45	73	10.95
28	1.70	51	3.60	74	11.60
29	1.70	52	3.75	75	12.35
30	1.75	53	3.90	76	13.15
31	1.80	54	4.10	77	14.05
32	1.85	55	4.25	78	15.00
33	1.90	56	4.45	79	16.10
34	1.95	57	4.65	80	17.30
35	2.00	58	4.90	81	18.65
36	2.05	59	5.15	82	20.15
37	2.10	60	5.40	83	21.85

38	2.15	61	5.65	84	23.80
39	2.25	62	5.95	85	26.10
40	2.30	63	6.25	86	28.80
41	2.40	64	6.60	87	31.90
42	2.50	65	6.95	88	35.50
43	2.60	66	7.35	89	39.65
				90	44.60

170 "The amount received under the above table shall be divided into two separate and distinct funds. Nine per centum of the receipts from payments under the above table shall be paid into and be known as the mortuary fund of the Fourth Class, and shall be used exclusively in the payment of claims incurred under certificates of membership, whether by death or otherwise, in said Fourth Class, except as may be otherwise provided for in Section 515 Supreme Statutes, and ten per centum of the receipts from payments under said table, together with such other sums as may be provided under said Section No. 515 Supreme Statutes, shall be paid into the expense fund of the Insurance Department.

"(d) The Board is empowered and directed to prepare and promulgate as speedily as possible a table of monthly payments providing for insurance of five-year and ten-year periods, respectively, using the table of rates herein before provided for as a basis for the said tables for said term insurance, and to grant to the members of the said Fourth Class the privilege of surrendering their present certificates and accepting in lieu thereof certificates in either of the said five-year or ten-year term plans herein provided.

"(e) The Board is hereby empowered and directed to prepare and promulgate as speedily as possible a table of rates based upon and using the above and foregoing table set out in Paragraph "c" as the standard of measurement, making it applicable to each present member of the Fourth Class and who may continue his membership to said January 1, 1911, so as to give to each said member insurance at the rate he is now paying or may be paying for 171 the month of December, 1910, for such period of time as said rate, providing for one payment each month, will continue.

The purpose of this provision being to give to said members the option of continuing at the rates that they are now paying for such a period of time as said rates will give them protection, using the standard of payments provided for in paragraph "c" hereof as the basis for determining the cost of the insurance.

"(f) The Board is hereby empowered and directed to as speedily as possible prepare and promulgate a table of rates using the said table set out in paragraph "c" hereof as the basis and standard of measurement so as to offer to the members of said Fourth Class who may continue their membership to January 1, 1911, insurance thereafter by scaling their present certificates down to such sum as the rates that they are, or may be paying for the month of December 1910, will provide insurance for the whole period of life.

"(g) The Board is hereby empowered and directed to as speedily

as possible prepare and promulgate a table or plan using the table or rates in paragraph "c" hereof as a standard of measurement, whereby after the 1st of January 1911, members of the Fourth Class who may desire to do so may continue making the monthly payments at the same rate as they pay for the month of December 1910, and have charged against their certificates as a lien thereon and the amount thereof to be deducted at the maturity of their certificates from any sum that may be due thereon, the then value as of January 1, 1911, and the additions down to the time of maturity of the deficiency so found to be due upon each member's

172 contract respectively by reason of the payment of an insufficient rate under the tables now and heretofore in force in said Fourth Class, using the said table in said paragraph "c" hereof, as aforesaid, for the ascertainment of the amount of said deficiency.

"(h) The Board is hereby empowered and directed to make, promulgate and enforce rules and regulations, giving to all members of the Fourth Class from and after January 1, 1911, who may satisfy the Board that they are unable to pay in cash the full amount of each monthly payment as provided for according to the table of rates in this section set out as herein provided, the privilege of making a payment in cash of such a portion of the monthly rate due from them as is equal to that portion of their rate required for current mortality and expense purposes, allowing the balance of said monthly rates to be charged against their certificates as a lien thereon, which, together with five per centum, per annum, as interest, shall be due and payable from them at their pleasure, and if not paid during their lifetime, shall be deducted from the amount due upon their respective certificates.

"(i) The Board is hereby empowered and directed to make, promulgate and enforce all necessary rules providing for the transfer of any present member of the Fourth Class who may desire to so transfer his insurance, or any portion thereof, to the Fifth Class, such transfer to be made at any time without expense to him and without medical examination.

173 "(f) The Board is hereby empowered and directed to as speedily as possible prepare, promulgate and enforce rules and regulations for granting to all members of the Fourth Class from and after January 1, 1911, benefits to be paid to said members in the case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age, provided that the period of life at the age of payment of physical disability benefits on account of old age commences shall not be under seventy years (unless a less age than seventy years may be authorized by the statute law of the various states, in which event said less age may be submitted for age seventy), said benefits herein provided for to be deducted from the face of the certificate at maturity from any sum that may be due thereunder or otherwise as said Board may determined, and to the end that the said members shall have the full benefit of the provisions of this paragraph, the Board is empowered to investigate all applications for benefit

fully and conclusively determine the right of each member applying for benefit to same and the amount of same, and to make all needful agreements with said members with respect to such payments as may be made hereunder, and all payments made hereunder to be paid out of the mortuary fund of the Fourth Class.

"The Board is directed to as speedily as possible communicate with all of the members of the Fourth Class whose address it may have or be able to obtain, advising them of the action of the Supreme Lodge, as set out in this section, and giving to them the various options provided for herein and advising them that on said January 1, 1911, of the applicability to them of the table of

monthly payments set out in paragraph "c" hereof, and that
174 their payments thereafter for each month will be in accordance therewith, subject, however, to their acceptance and election in writing and adoption by them of some one of the plans and options provided for by the several paragraphs hereof, and upon the failure of any member to so elect and adopt some one of the plans and options, his payments from and after January 1, 1911, shall be made as provided for in said paragraph "C" and any member of the Fourth Class who shall fail to pay when due said monthly payments shall thereby ipso facto cease to be a member and his certificate, with all rights thereunder in said Fourth Class, shall thereby terminate subject to the provisions of the laws with reference to re-instatement.

"The Board shall, in addition to the duties required of it under Section 465, Supreme Statutes, make an accounting and valuation in the Fourth Class at the close of business on the 31st day of December of each year for the purpose of ascertaining the cost of mortality and expense and making provision for the maturity of said contracts. If such accounting and valuation shall disclose a surplus after providing for mortality expense and said future requirements equal to or exceeding one or more monthly payments from all members of said Fourth Class who have been members for one full year or more, then such surplus shall be distributed to said members entitled to participate therein as herein provided, by crediting one or more monthly payments as the case may be, within three months after December 31st of the year for which the accounting and valuation is had, and any surplus is not equal

to the aggregate monthly payments of those entitled to participate in said accounting and valuation shall be retained
175 by the Board and disposed of in the next annual accounting and valuation; that the said distribution shall be on the monthly basis so that the waiving of monthly assessments shall apply at the end of the certificate year instead of the calendar year, and in the making of said accounting the Board shall take into consideration the requirements of the expense fund as is provided for with respect to the Fifth Class in Section 505, Supreme Statutes, and shall furnish to members of the Fourth Class the statement of accounting applicable to them as provided for to members of the Fifth Class in Section 506 Supreme Statutes.

"It is hereby declared to be the purpose and intent of the Su-

preme Lodge to invest the said Board with every requisite power and all needful authority to carry into full effect the purposes of this section and except the power to repeal or change any provision of this section, to do everything in respect thereto that the Supreme Lodge itself might or could do.

"It is further provided that if it shall, at the instance of any member or number of members be determined in any proceeding of law or equity in any state that the provisions of this section, as amended, do not apply or cannot be enforced against the members residing in such state, then it is expressly declared that as to such members said Section 468, Supreme Statutes, as it exists before the adoption of this amendment shall not be repealed but shall exist in full force and effect as though its amendment had never been attempted, and it shall be the duty of the Board to enforce said section as to the members in such state as it exists before the
176 adoption of this amendment, the purpose of this paragraph being to provide against a hiatus in the law and to restore to life and effectiveness the said section as it now is if this amendment shall for any reason be held not valid as to the present members of the Fourth Class. If any provision or paragraph of this section shall for any reason be held invalid the remaining portion of the section shall be unaffected thereby.

"479. The right to change, increase or adjust the schedules of the rates in the Fourth and Fifth Classes, respectively, or any of them, is expressly reserved to the Supreme Lodge, as is also the right to apply any such changed, increased or adjusted schedule of rates to all the members as of the date of their adoption without regard to the date of any member's certificate. This right of adjustment includes the right to advance members without reference to the plan or class of which they are members to their attained age at any time and apply new rates applicable thereto when deemed necessary by the Supreme Lodge to carry out the purposes of the Insurance Department."

"509. No member of the Insurance Department shall have any divisible interest in the funds or properties of the Insurance Department, and, except as provided for in these laws with respect to the members of the Fifth Class, there shall be no apportionment of any of said funds at any time, and then only as provided for in the accounting required to be made in the Fifth Class. Except, as it may appear otherwise, in the accounting in the Fifth Class, no member of the Insurance Department shall have any claim
177 whatever, during his lifetime, to any part of the funds or properties of the Insurance Department or to have any portion of same applied to the maintenance of his certificate, and then only as these statutes expressly provide respecting the accounting and lapsing of assessments, except further in the case of members of plans "A", "B" and "D", who may be entitled to paid-up or extended insurance in the manner and to the extent in these laws provided. Provided that except as may be provided by Section 468, the members of the Fourth Class shall have no divisible

interest in the funds or properties of the Insurance Department nor be entitled to any apportionment or application of the same. In effect October 8th, 1910."

Counsel for plaintiff introduced the following from Gross Int. of the Witness W. O. Powers:

"I attach hereto a true and correct copy of a notice entitled: 'Elections open to members of the Fourth Class of the Insurance Department Supreme Lodge Knights of Pythias.' Notices similar to the one attached hereto were mailed to all members of the Fourth Class. The one addressed to C. A. Gill was mailed on October 12, 1910. The one to S. Mims was mailed on October 13, 1910, and the notice to J. A. Hicks was mailed on October 11, 1910. These notices were mailed under the direction of the Board of Control of the Insurance Department and by the authority and direction of the Supreme Lodge."

Counsel for plaintiff introduced in evidence copy of notice mentioned above, and as attached to said Powers' deposition, as follows:

"Elections open to Members of the Fourth Class of the Insurance Department, Supreme Lodge Knights of Pythias.

Name — Certificate No. — Section No. — Amount of Certificate, \$—. Born — 18—. Age at nearest birthday January 1, 1911 — years.

INDIANAPOLIS, Ind., — 1910.

DEAR SIR AND BROTHER:—The Supreme Lodge, Knights of Pythias, in regular Convention assembled, on the 10th day of August, A. D. 1910, by Section 468, Supreme Statutes, relating to the Insurance Department, enacted and provided that:

1. (Paragraph "B" and "C") Every member of the Fourth Class on January 1, A. D. 1911, shall be re-rated according to his attained age and occupation and amount of benefit provided for in his certificate, in accordance with the table of rates therein provided and his monthly rates thereafter to be as provided for by said table, unless the member shall elect to take some one of the options provided for in said section 468. If you do not elect to take one of the options and desire to continue the amount of your present certificate for the remainder of your life, then, beginning with the month of January, 1911, and for each month thereafter, your monthly payment will be \$—. If you accept one of the following options, the above paragraph will not apply to you.

"The options are as follows:

2. (Paragraph "D") You may surrender your present certificate and accept a certificate in lieu thereof and for the amount thereof, which will insure you for the term of five (5) years for the monthly payment of \$— or for the term of ten (10) years for the same amount for the monthly payment of \$—. At the end of the five (5) or ten (10) years period, whichever you elect to accept, the certificate will terminate and you will no longer be insured under it. If you should die while the certificate is in force and before its termination, the amount thereof will be paid your beneficiary.

"3. (Paragraph "E") Or you may elect to continue making the same payment which you now pay each month, to-wit: \$— from and after January 1, 1911, and upon surrendering your present certificate, a new one will be issued to you for the amount of the old certificate, but it will terminate on the — day of — A. D. 19—; your present rate being sufficient to give you life insurance protection until said date, but no longer. If you die within that time, the amount of the certificate, if in force, will be paid to your beneficiary, but it will expire on that date and you will no longer be insured under it.

"4. (Paragraph "F") Or if you so select, you may have your present certificate scaled down to such a sum as the rates that you are now paying will provide insurance for the whole period of your life, regardless of when your death occurs, and your rate under this plan will be just what it is now, that is, \$— per each month, but the amount of your certificate will be \$— instead of its present amount, and if kept in force until your death regardless of when death occurs, the amount thereof will be paid your beneficiary.

"5. (Paragraph "G") Or if you elect to retain the present certificate that you have and are unwilling to accept any of the other options, you may have a lien placed against your certificate, the amount of such lien to be deducted at the maturity of the certificate whenever the same matures by your death and you 180 may continue to pay the same rate that you are now paying, to-wit: \$— per each month. Under this option the lien will be \$— and will be deducted from the face of your certificate at maturity, leaving the balance of \$— to be paid to your beneficiary.

"6. (Paragraph "H"). Or you may elect to continue the full amount of your insurance protection for the whole period of your life and to be re-rated as of your age at nearest birthday January 1, 1911, and if you are unable to make the payment of \$— that will be due from you under said certificate as each monthly payment from and after January 1, 1911, and will satisfy the Board that you are unable to pay the whole of said monthly payment in cash, then you may pay in cash the sum of \$— for each month and the sum of \$— for each month will be charged against your certificate, together with 5 per centem per annum as interest, which said sums not so paid by you with the interest, whatever they aggregate at the time of the maturity of your certificate, will be deducted from the face amount thereof. You may, if you choose, relieve your certificate of this lien, or any portion thereof, at any time, by paying the amount of same or any portion thereof.

"7. Or you may, if you choose, transfer the whole or any portion of your insurance from the Fourth to the Fifth Class, such transfer to be made without expense to you and without medical examination, but in the event of such transfer you will be re-rated at your attained age and in accordance with the plan in said Fifth Class to which you elect to transfer.

181 "You are required by said enactments of the Supreme

Lodge to elect in writing on or before the first day of January, 1911, which of the options you will avail yourself of, and in the event you fail to make such election, your rates on January 1, 1911, will be automatically raised, as is stated in the first paragraph hereof, to the sum of \$ — which sum will be due from you for each month thereafter, beginning with the month of January, 1911.

"If you desire any further information with respect to any of these option, it will be cheerfully furnished you.

"The sole purpose of the Supreme Lodge in taking the action noted above was to provide sufficient funds so that every and the last certificate may be paid at maturity and that each member may bear his just and equitable portion of the cost of raising the requisite funds for such purposes.

"From and after January 1, 1911, every certificate in the Fourth Class will be annually valued the same as certificates in the Fifth Class, and the surplus that may be accumulated will be distributed in the same way as it is done in the Fifth Class, by the waiving of assessments, and all Fourth Class certificates, after they have been in force for three years after January 1, 1911, will be incontestable for suicide, the same as are certificates in the Fifth Class.

"Please sign one of the elections herewith enclosed, all blanks of which have been filled out, and return it to the Board of Control at once. Do not sign more than one election.

Fraternally submitted,

BOARD OF CONTROL,
By UNION B. HUNT,
President Insurance Department."

182 Counsel for plaintiff introduced in evidence the following from Cross Int. of the witness Powers: Being the laws of 1880 as identified by the witness Powers:

Article IV.—Membership.

"Section 1. No person shall be admitted to this Rank who is not in possession of the Third, or Chivalric Rank of Knight, and in good standing in the Order of Knights of Pythias, and not over fifty years of age except in third class, where persons over fifty years and not over sixty years may be admitted), nor unless he be reported favorable upon by a committee of investigation, and is recommended by some competent practicing physician (if possible a member of the Rank) who shall have examined into his physical condition, giving a certificate in the form prescribed for the Rank, nor unless the necessary fee accompany the application, and he pass a fair ballot.

Article V.

"Section 1. Of the amount, three dollars, paid by each member as admission fee, for one class, two dollars shall be paid to the Supreme M. of E., one dollar for the Expense Fund, and one dollar for the Endowment Fund of this Rank, and the remaining one dollar shall

be retained in the treasury of the Section for general expenses. If the application is for both classes, three dollars, and if for all three classes, five dollars must be sent to the S. M. of E. Sections may increase the admission fee for members as they desire; but the minimum fee of three dollars for an applicant entering but one class and four dollars when both classes are entered, must be collected of each applicant.

183 "Section 2. The members of the Endowment Rank shall consist of three classes, and be designated as First, Second and Third Class. Any member of the Endowment Rank may belong to either or all of the Classes if he possesses the legal qualifications, but no members can hold two memberships in the same Class. One Thousand Dollars shall be the maximum fund in the First or in the Third, and Two Thousand Dollars shall be the maximum fund in the Second Class. When there are less than one thousand members in the First or Third Classes, the benefit accruing therefrom shall be one dollar for each and every member thereof. When there are less than two thousand members in the second class, the benefit accruing therefrom shall be one dollar for each and every member thereof. The funds paid by the members of each class shall be held separately and distinctly one from the other. Secretaries and Treasurers will also collect from new members, and members applying for additional class or classes, one dollar and ten cents for each class, to be held in surplus to meet the first assessment they may become liable to.

ARTICLE VI.

Duties of Supreme Officers.

"Sec. 4. The Supreme Master of Exchequer, in addition to his other duties, shall have charge of the financial affairs of the Endowment Rank. He shall keep a separate register for each class of members of the Rank, which shall exhibit the name of each member, his age, residence, number of the Section, and name and number of the Lodge to which he belongs, corresponding in numerical order to the certificates of membership issued by him, and
184 upon which shall be noted all suspensions, resignations, re-instatements, death and transfers of membership from one Section to another, as reported by the Secretaries and Treasurers of the Sections. He shall prepare and issue all blank applications for membership, and all blank notices and other forms prescribed by the laws of the Rank, or that may become necessary in prosecuting the business of the Rank. He shall have charge of two funds, an Endowment Fund made up of the sum of one dollar from each and every member of the Rank upon his admission, and one dollar from each member at each subsequent assessment; and an Expense Fund, made up of the sum of one dollar from each admission fee, and the sum of ten cents from each subsequent assessment, and receipts from supplies. He shall have power to provide himself from the Expense Fund with such books, stationery, etc. as may become neces-

sary in the discharge of the duties of his office, and to pay therefrom all bills incurred for rent of offices, printing, postage, etc., on the order of the Supreme Chancellor. He shall render a full and complete account and report to the Supreme Lodge at each regular session and shall submit his books, etc., for inspection to the Supreme Chancellor or to the Trustees of the Supreme Lodge, at least once every three months, or when requested so to do. Upon receiving notice, and good and sufficient proof, of the death of a member of either class of the Endowment Rank, he shall transmit to the Secretary and Treasurer of the Section to which the deceased belonged, a negotiable draft for the amount of the benefit to which he was entitled to be drawn in favor of the party or parties entitled to receive the same.

After paying this claim, should there remain in the fund belonging to the class of which the deceased was a member, a less amount than is sufficient to pay a benefit in that class, the Supreme Master of Exchequer shall immediately notify the Secretary and Treasurer of each Section to collect and forward an assessment of one dollar and ten cents from each member of said class, which must be paid within thirty days. He shall give bond in the sum of thirty thousand dollars, with approved security, conditioned for the faithful performance of the duties of his office and faithfully accounting for all funds coming into his hands. He shall quarterly divide the surplus in the Expense Fund, pro rata, to the amount received in each class between the first, second and third class of the Endowment Rank.

"These laws may be altered or amended at any regular session of the Supreme Lodge, K. of P."

Counsel for Sections of the Endowment Rank, of the Knights of Pythias, enacted in 1877:

"Article 1.

"SECTION 1. A section of the Endowment Rank shall consist of not less than seven members who are in good standing. It shall be known as Section No. — of the Endowment Rank, of the Knights of Pythias.

"SEC. 2. Stated meetings shall be held at least once a month, at such time and place as shall be fixed by by-law. Meetings for conferring this Rank, or for other business, may be held upon the call of the President, at the request or with the concurrence of two other officers of the Section.

"SEC. 3. Not less than seven members shall constitute a quorum. In the absence of the President, the Vice President shall preside; in the absence of both, any member may be called to preside.

"SEC. 4. The Section shall have an official seal, with appropriate device, which shall be affixed to all official documents and papers issued by the Section. The seal to be purchased from the Supreme Lodge.

"SEC. 5. Each Section shall elect as Medical Examiner a regular practicing physician, who shall, if possible, be a member of the

Rank. His fee for each and every examination shall not exceed one dollar, to be paid by the applicant at time of examinaion.

Article II.

SEC. 1. The officers of a Section shall be a President, Vice President, Chaplain, Secretary and Treasurer (one office), Guide, Guard and Sentinel. Their duties shall be prescribed in the Installation Service and in the Ritual; except as hereinafter provided.

"SEC. 2. The officers shall be nominated and elected annually, at the last stated meeting in December, and shall be installed at the first regular meeting in January following. Any member in good and regular standing shall be eligible to any office in his section.

Article III.

"SECTION 1. No person shall be eligible for membership in this Rank unless he be a Knight of Pythias in good and regular standing in his Lodge, and not over fifty years of age; Provided, until June 1, 1878, all members of the Knights of Pythias may become members of the Endowment Rank without regard to age, provided they possess the other required qualifications.

187 "SEC. 2. Applications for membership must be accompanied by a certificate from the Lodge to which the applicant belongs, that he is not in arrears for dues, and a medical certificate from the physician, designated by the Section, to which the application is made. A fee of three dollars must accompany the application.

"SECTION 3. An application may be received, considered by a committee, the candidate balloted for, and if elected, the Rank conferred upon the same evening.

"SEC. 4. An application for membership shall be balloted for by ball ballot. Should two black balls appear the ballot shall be renewed immediately. Should two or more black balls appear on the second ballot, he shall be declared rejected, and no other ballot taken in his case for the period of six months thereafter.

Article IV.

"SECTION 1. A member may, at any time, withdraw from membership in this Rank, provided there are no financial or other charges against him. Such withdrawal shall cause the entire forfeiture of all amounts paid by the member into the Endowment Fund, and all other moneys contributed by him to his Section.

"SEC. 2. When a member of this Rank voluntarily withdraws from the Knight's Rank in his Lodge, or is suspended therefrom for non-payment of dues, or whenever his membership therein ceases from any cause, he thereby severs his connection with this Rank and forfeits all his right, title and interest in and to the Endowment Fund, and all amounts he may have contributed thereto: Provided, that a member who takes a withdrawal card from his Lodge shall not lose his membership

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in this Section nor his interest in the Endowment Rank if he shall regularly pay all assessments while holding his card, and shall, within six months, deposit said card, notifying the Secretary and Treasurer of his Section, and forwarding to the Supreme M. of E. the certificate from the M. of E., of the Lodge in which he has deposited his card.

"SEC. 3. Upon reconnecting himself with his Lodge, or joint another, a member may regain his position in the Endowment Rank and his interests in the Endowment Fund, by submitting to a new medical examination, making a new application with the admission fee enclosed, and paying all arrears charged against him at the time of suspension.

"SEC. 4. Every member in case of removal or protracted absence from home, shall notify the Secretary and Treasurer of his Section thereof; and shall make such arrangements as will enable the Secretary and Treasurer to collect all assessments at his residence, or pay the Secretary and Treasurer not less than three assessments at one time in advance.

"SEC. 5. In addition to the preceding penalties, a member may be suspended from this Rank (without its necessarily affecting his standing in the Lodge to which he belongs) for a violation of any part of the obligation assumed in becoming a member of this Rank; and in case of such suspension for such cause shall forfeit all interest in the Endowment Fund; and if re-instated, he must pay the admission fee and all assessments have accrued during the period of his suspension.

189 "SEC. 6. Each Section may provide, by-law, a code of procedure not inconsistent with the laws of the Supreme Lodge, by which all charges for violation of the obligation of this Rank shall be preferred and trials of the same shall be conducted.

Article V.

"SEC. 1. Of the amount, three dollars, paid by each member as admission fee, two dollars shall be paid to the Supreme M. of E., one dollar for the Expense Fund and one dollar for the Endowment Fund of this Rank, and the remaining one dollar shall be retained in the treasury of the section for general expense.

"SEC. 2. The members of the Endowment Rank shall consist of two Classes, and be designated as First Class and Second Class. Any member of the Rank may belong to either or both classes if he possesses the legal qualifications, but no member can hold two memberships in the same Class. One thousand dollars shall be the maximum fund in the first class, and two thousand dollars shall be the maximum fund in the second class. When there are less than one thousand members in the first class, the benefit accruing therefrom, shall be one dollar for each and every member thereof. When there are less than two thousand members in the Second Class, the benefit accruing therefrom shall be one dollar from each and every member thereof. The funds paid by the members of each class shall be separately and distinctly (held) one from the other.

"SEC. 3. Upon receiving this Rank, each member must designate the class in which he desires to be enrolled, and his interest
190 in said Endowment Fund shall commence from that date.

The Secretary and Treasurer shall immediately certify this fact to the member under the Seal of the Section. As soon thereafter as possible the member shall receive the regular certificate of membership in the Endowment Rank issued by the Supreme Chancellor and Supreme Keeper of Records and Seal, and countersigned and registered by the Supreme Master of Exchequer, specifying the Class to which he belongs, and certifying that at his death the benefit specified in the preceding section shall be paid.

"SEC. 4. Upon the death of a member of a Section the Secretary and Treasurer shall immediately notify the Supreme M. of E. officially of the fact.

Article VI.

"SEC. 1. The Secretary and Treasurer shall keep a financial account with each member of the Section, charging him with each assessment, immediately upon notification of the same from the Supreme M. of E., and crediting him upon payment of the same. He shall notify the Supreme M. of E. of every failure to pay the assessment within the prescribed term. He shall make a monthly report to the Supreme M. of E. on the first of every month, and transmit therewith all moneys in his hands belonging to the Endowment Rank or the Expense Fund of Endowment Rank.

"SEC. 2. The Secretary and Treasurer shall give bond (form prescribed by the Supreme Lodge, to the President, with approved security, in such sum as the Section may designate, for the faithful discharge of the duties of his office, and he may receive such compensation for his services as the Section shall provide by by-law.

191 "SEC. 3. The Secretary and Treasurer shall keep in books furnished for the purpose by the Supreme Lodge, two registers of members of the Section (one for members of the first class and one for members of the second class), with their names, ages, residence, name and number of the Lodge to which they severally belong, and their post-office address.

"SEC. 4. Upon receiving from the Supreme Master of Exchequer notice of the death of a member of this Rank and of consequent assessment, the Secretary and Treasurer shall immediately give notice to each member of the class to which the deceased belonged in the prescribed form, and notify him to pay the assessment within thirty days.

Article VII.

"SEC. 1. Upon receiving notice of an assessment each member shall at once pay the amount to the Secretary and Treasurer of the Section to which he belongs. In case any member neglects for thirty days after date of notice to pay said assessment he shall stand suspended from the Endowment Rank and shall forfeit all claims upon the Endowment Fund, and the fact of said suspension shall be reported to the Supreme Master of Exchequer in the monthly re-

port. Provided, that any member thus suspended for non-payment of assessments shall have the privilege of regaining all his rights as a member of the Section within three months, by passing a new medical examination, paying all the assessments that may have accrued up to that time. But when three months shall have elapsed from the date of suspension he shall be required to pay, in addition to the assessments that have accrued, the sum of two dollars, 192 pass a new medical examination, and then be re-admitted by a two-thirds vote of the members of the Section present when the application is made. All re-instatements in accordance with this section shall be reported to the Supreme Master of Exchequer by the Secretary and Treasurer in his monthly report.

Article VIII.

"Each section shall have the right to make by-laws for their own government, not inconsistent with these laws; and shall provide in addition to the one dollar received from each admission fee, such further revenue as may be necessary to cover the expenses (if any) of their meetings &c.

Article IX.

"Upon the death of a member of this Rank the benefit as specified in Art. V shall be paid by the Secretary and Treasurer (as soon as received from the Supreme Master of Exchequer) to the widow and children of the deceased; and if there be no widow and children, then to the father and mother, sisters and brothers, share and share alike. Provided, that the amount of said benefit shall be held sacred, a legacy to and for the said legatees, and shall never, under any circumstances, be liable for, or be appropriated to the payment of any debts against the estate of said deceased member. Provided further, that the member shall have full power to dispose of the sum so accruing upon his death by will; or he may name a party at the time he becomes a member of his Rank to whom the money shall be paid upon his death. If none of the aforesaid persons be alive, and the deceased shall have made no disposition by will, the 193 Section shall appropriate toward the funeral expenses of the deceased as much as shall be necessary for that purpose, and after said payment the surplus remaining shall be paid into the Widow and Orphans' Fund of the Lodge of Knights of Pythias to which the deceased belonged. To whomsoever said amount shall be paid in accordance with the preceding provisions, the President and Secretary of this Section shall take receipts for all and every part thereof, and shall also take up the certificate of membership in this Rank belonging to the deceased, and forward the same to the Supreme Master of Exchequer to be cancelled. The benefit shall always be payable within sixty days of proof of death.

Article X.

"SEC. 1. A member of this Rank, changing his residence and desiring to transfer his membership to another Section, shall be

entitled to receive a clearance card by paying all assessments and charges appearing against him on the book of the Section—as furnished by the Supreme Lodge—countersigned by the President and Secretary and Treasurer of the Section, certifying to his good standing in the Rank and to his title to an interest in the Endowment Fund.

“SEC. 2. A clearance card from a section shall be considered good for six months, and during this time or until deposited in another Section, the section granting the card shall retain his name on its books, and he shall keep his dues and Endowment assessments paid up as though he had not received the card. If at the end of six months he has not deposited his card in some other section, his name shall stand suspended from membership and forfeit all
194 title and interest in the Endowment Fund of this Rank.

“SEC. 3. An application for admission to a section upon deposit of such clearance card shall be accompanied by the fee of one dollar, and shall be subject to the same ballot as an original application for membership, and when a member is thus admitted to a section, notice shall be given to the Supreme M. of E. in the monthly report of the Secretary and Treasurer.”

Counsel for the plaintiff introduced in evidence Cross Interrogatory No. Thirty of the witness Powers, the following from the laws as passed in 1884:

Article V.

Graded Class.

“SEC. 1. In addition to the three classes specified in Section 2 of Article IV of this Constitution, there shall be a class endowment designated as the fourth class. In said class the benefit to be obtained may be one thousand dollars, two thousand dollars, or three thousand, at the option of the applicant.

“SEC. 2. Membership in said class may be obtained in the manner provided for the other classes, the application to designate clearly the amount of endowment desired. Members who may have withdrawn from one or more of the other classes, or who may have been suspended therefrom for non-payment of dues or assessments, may be admitted to this class without re-instatement into the class or classes with which they were formerly connected.

195 “SEC. 3. The fee for membership in the fourth class, which in all cases accompany the application, shall be two dollars for each and every thousand dollars of the endowment applied for, provided that members of the first class, second or third classes leaving them and entering the fourth, may do so without the payment of the fee herein required. In addition to said fee the applicant shall pay the medical examiner for his services, and twenty-five cents for the medical examiner-in-chief.

“SEC. 4. The Endowment fund for the payment of benefits in the fourth class shall be derived from monthly payments by each member, said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to

be taken at the nearest anniversary of his birthday. So much of such monthly payments as shall equal the actual cost of the endowment shall constitute the Endowment Fund, and the residue of such monthly payments shall be placed in the reserve fund. Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues. The said monthly payment for endowment and reserve shall be according to the following table:

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Age at admission.	Cost or amount of endowment fund.	Amount to reserve fund.	Total monthly payments for each \$1000.
21	\$0.40	\$0.30	\$0.70
22	40	30	70
23	40	30	70
24	40	30	70
25	40	35	75
26	40	40	75
27	40	40	80
28	40	40	80
29	40	40	80
30	40	40	80
31	45	40	85
32	45	45	90
33	45	45	90
34	45	50	95
35	45	50	95
36	45	55	1.00
37	45	55	1.00
38	50	55	1.05
39	50	60	1.10
40	50	60	1.10
41	50	65	1.15
42	50	70	1.20
43	55	70	1.25
44	55	75	1.30
45	60	75	1.35
46	60	80	1.40
47	60	85	1.45
48	65	85	1.50
49	70	85	1.55
50	70	90	1.60
51	75	90	1.65
52	80	95	1.75
53	85	95	1.80
54	95	1.00	1.90
55	95	1.05	2.00
56	1.00	1.10	2.10
57	1.10	1.10	2.20
58	1.15	1.15	2.30
59	1.25	1.15	2.40
60	1.35	1.20	2.55

197 "SEC. 5. Until one monthly payment by members holding an equal amount of endowment, less the amount placed in reserve, shall be sufficient to pay the amount of endowment held by a brother, the benefit to be paid in case of death shall be a sum equal to one payment by each member holding an equal amount of endowment, less the amount to be placed in reserve.

"SEC. 6. The reserve fund, consisting of the membership fees and the parts of monthly payments as provided by Section 4 of this article, shall be in the keeping of the Supreme Master of Exchequer, and so much thereof as may not be needed for the payment of the expenses of this class, shall be invested by him under the superintendence of the Board of Control.

"SEC. 7. The expenses of conducting the business of the Fourth class shall be paid out of the reserve fund.

"SEC. 8. A member holding an endowment certificate in the fourth class, and desiring to change the amount of such endowment, shall proceed as in the case of an original application, Provided, that if such change Decrease the amount of his endowment, he need not undergo a new medical examination. Upon the return of the new application and the surrender of the old certificate, the Supreme Secretary will issue a new endowment certificate as applied for.

"SEC. 9. All the laws, forms and business details of the Endowment Rank, heretofore made and hereafter enacted shall apply with full force to the fourth class and the members thereof, so far as they are applicable thereto, and so far as they are not changed
198 by the provisions of this Article."

Counsel for plaintiff introduced the following from Cross Int. 14, of witness Powers:

"Members were transferred from the first, second and third classes to the fourth class at original entry age.

"If transferred from the old classes prior to July 1, 1885, they were rated to August 1, 1888, based on original entry. From August 1, 1888, rated at age at transfer."

S. MIMS, the plaintiff, being sworn, testified as follows:

"My name is S. Mims—Savage Mims is my full name. I was born the 6th day of June 1837—was born in Alabama. I have lived in Texas forty three years. I reside now at Thurber in Erath County, Texas. I am connected with the Texas & Pacific Coal Company, Secretary and Assistant Treasurer of the Texas & Pacific Coal Company. I have been connected with that company for twenty five years. I have acted in the capacity of secretary and assistant treasurer for that company for twenty five years.

"I am the plaintiff in this case. (Witness was handed a paper.) I received this through due course of mail along about the time it is dated, which is, the 13th of October, 1910.

(Counsel for Plaintiff introduced the paper above referred to and identified, which is as follows:)

"Elections Open to Members of the Fourth Class of the Insurance Department, Supreme Lodge Knights of Pythias.

199 "Name, S. Mims. Certificate No. 4183. Section No. 198. Amount of Certificate \$3,000. Amount of present monthly payment \$7.35.

"Born June 6, 1837. Age at nearest birthday January 1, 1911, 74 years.

INDIANAPOLIS, IND., 10/13, 1910.

"DEAR SIR AND BROTHER: "The Supreme Lodge, Knights of Pythias, in regular Convention assembled, on the 10th day of August, A. D. 1910, by Section 468, Supreme Statutes, relating to the Insurance Department, enacted and provided that:

"1. (Paragraphs "B" and "C".) Every member of the fourth class on January 1, A. D. 1911, shall be rated according to his attained age and occupation and amount of benefit provided for in his certificate, in accordance with the table of rates therein provided and his monthly rates thereafter to be as provided for by said table, unless the member shall elect to take some one of the options provided for in said Section 468. If you do not elect to take one of the options and desire to continue the amount of your present certificate for the remainder of your life, then beginning with the month of January, 1911, and for each month thereafter, your monthly payment will be \$34.80. If you accept one of the following options, the above paragraph will not apply to you.

"The options are as follows:

"2. (Paragraph "D".) You may surrender your present certificate and accept a certificate in lieu thereof and for the amount thereof, which will insure you for the term of five (5) years 200 for the monthly payment of \$26.85, or for the term of ten (10) years for the same amount for the monthly payment of \$31.20. At the end of the five (5) or ten (10) year period, whichever you elect to accept, the certificate will terminate and you will not longer be insured under it. If you should die while the certificate is in force and before its termination, the amount thereof will be paid your beneficiary.

"3. (Paragraph "E".) Or you may elect to continue making the same payment which you now pay each month, to-wit: \$—, from and after January 1, 1911, and upon surrendering your present certificate, a new one will be issued to you for the amount of the old certificate, but it will terminate on the — day of —, A. D. 19—, your present rate being sufficient to give you life insurance protection until said date, but no longer. If you die within that time, the amount of the certificate, if in force, will be paid to your beneficiary, but it will expire on that date and you will no longer be insured under it.

"4. (Paragraph "F".) Or if you so elect, you may have your present certificate scaled down to such a sum as the rates that you are now paying will provide insurance for the whole period of your life, regardless of when your death occurs, and your rate under this

plan will be just what it is now, that is, \$7.35 per each month, but the amount of your certificate will be \$633.00 instead of its present amount, and if kept in force until your death, regardless of when death occurs, the amount thereof will be paid your beneficiary.

201 "5. (Paragraph "G".) Or if you elect to retain the present certificate that you have and are unwilling to accept any of the other options, you may have a lien placed against your certificate, the amount of such lien to be deducted at the maturity of the certificate, whenever the same matures by your death, and you may continue to pay the same rate that you are now paying, to-wit: \$7.35 per each month. Under this option the lien will be \$2,367.00, and will be deducted from the face of your certificate at maturity, leaving the balance of \$633.00 paid to your beneficiary.

"6. (Paragraph "H".) Or you may elect to continue the full amount of your insurance protection for the whole period of your life and to be rerated as of your age at nearest birthday January 1, 1911, and if you are unable to make the payment of \$34.80 that will be due from you under said certificate as each monthly payment from and after January 1, 1911, and will satisfy the Board that you are unable to pay the whole of said monthly payment in cash, then you may pay in cash the sum of \$25.05 for each month and the sum of \$9.75 for each month will be charged against your certificate, together with 5 per centum per annum as interest, which said sums not so paid by you with the interest, whatever they aggregate at the time of the maturity of your certificate, will be deducted from the face amount thereof. You may, if you choose, relieve your certificate of this line or any portion thereof, at any time, by paying the amount of same or any portion thereof.

202 "7. Or you may, if you choose, transfer the whole or any portion of your insurance from the fourth to the fifth class, such transfer to be made without expense to you and without medical examination, but in the event of such transfer you will be rerated at your attained age and in accordance with the plan in said fifth class to which you elect to transfer.

"You are required by said enactments of the Supreme Lodge to elect in writing on or before the first day of January, 1911, which of the options you will avail yourself of, and in the event you fail to make such election, your rates on January 1, 1911, will be automatically raised, as is stated in the first paragraph hereof, to the sum of \$34.80, which sum will be due from you for each month thereafter, beginning with the month of January, 1911.

"If you desire any further information with respect to any of these options, it will be cheerfully furnished you.

"The sole purpose of the Supreme Lodge in taking the action noted above was to provide sufficient funds so that every and the last certificate may be paid at maturity and that each member may bear his just and equitable portion of the cost of raising the requisite funds for such purposes.

"From and after January 1, 1911, every certificate in the fourth class will be annually valued the same as certificates in the fifth class, and the surplus that may be accumulated will be distributed in the

same way as it is done in the fifth class, by the waiving of assessments, and all fourth class certificates, after they have been 203 in force for three years after January 1, 1911, will be incontestable for suicide, the same as are the certificates in the fifth class.

"Please sign one of the elections herewith enclosed, all blanks of which have been filled out, and return it to the Board of Control at once. Do not sign more than one election.

Faternally submitted,

BOARD OF CONTROL,
By UNION B. HUNT,
President Insurance Department.

Issued in triplicate, one original copy placed on file in office of Board, one original copy mailed to member at his last known address on 13th day of October, 1910, one original copy mailed to Superintendent."

"I declined to submit to the raise specified in the above notice—I declined to pay the raise."

(Witness was handed paper.) "I identify this as a notice given by Capt. Tom West. I am familiar with Capt. Tom West's hand writing. This is his hand writing. I am familiar with the hand writing of Mr. I. Carb. This is Mr. I. Carb's hand writing. (Referring to paper.) Mr. I. Carb was local secretary of Knights of Pythias at Fort Worth, and had been for a good many years—twenty odd years. I directed Captain West to take this action."

(Counsel for plaintiff introduced in evidence the paper referred to above, which is as follows:)

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"Jan. 20th, 1911.

Mr. I. Carb, Esq., Sec'y of Section 198, Endowment Rank, Knights of Pythias, Fort Worth, Texas:

S. Mims, the holder of certificate No. 4183, fourth class for \$3,000.00, issued on the 29th day of May, 1885, registered in Book 1, Folio 84, through his attorney Thomas F. West, here tenders you in legal tender \$22.05 for the purposes of paying the monthly payment on said certificate of membership for the full quarter being the months of January, February and March, 1911.

Very respectfully,

S. MIMS,
By THOMAS F. WEST."

(Also the following written on bottom of the above instrument.)

"FORT WORTH TEXAS, Jan'y 20, 1911.

The sum of \$22.05 amount stated above, was tendered me for Jan. Feb. & Mar. 1911, payments, & under my instructions I have refused same.

I. CARB,
Sec'y Sect. 198,
Insurance Department, K. of P.

"Up to the time that I received notice of this raise I was paying \$7.35 a month assessments. Up to the time of this raise I had paid my dues promptly as required from the time I originally went in in 1879; I paid quarterly most of the time in advance, but I declined the options that they offered me.

205 "I was born June 6th, 1837, and I received this option notice in October 1910. I was then seventy-three years of age. My last certificate was issued in the fourth class in 1885. At the time that I made the change of certificates and went into the fourth class in May 1885, I was paying my dues in Ft. Worth. I originally joined at Galveston and then later transferred to the Red Cross at Ft. Worth. I transferred my membership from Galveston to Ft. Worth. I do not remember the date that I transferred from Galveston to Ft. Worth, but it was prior to the time that I received this last certificate.

"I do not remember who the local collector of the Knights of Pythias was at the time I exchanged my certificate and went into the fourth class, but it was the one that was there prior to the time that Mr. I. Carb was there. It has been about thirty years ago. The man has been dead for some time. I remember the man but I do not remember his name. He was the local secretary of the Lodge at Ft. Worth and he is dead now. I was furnished with a schedule by the Local Secretary of what the rates would be if I went into the fourth class. I took out my first policy while I was in Galveston, Texas. I have never paid any assessments anywhere except in Galveston and in Ft. Worth."

Cross-examination:

(Witness was handed a paper.)

"This is my signature to this paper. This is the application I made for insurance in the Knights of Pythias. This is the original application for membership in that Lodge in the City of Galveston, State of Texas, in the Endowment Rank. It is dated the 10th of April 1879.

206 "I am secretary and assistant treasurer of the T. and P. Coal Company. I have been individually engaged in business all these years. I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to

pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would be when the Ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments if they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan.

207 "If, when we had five thousand members a rate is fixed at so much per month, unless that amount was too much. If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you meet the obligations. I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I cannot remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the Lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth."

Redirect examination:

"I have remained a social member and am a member now, keeping my dues paid all the while. The schedule, which was been introduced in evidence shows that I went into the fourth class at \$3.65 per month, and in 1888 it was raised to \$4.50 per month, and then in 1904 to \$4.65 per month, and then in 1901, to \$7.35 per month, which I have paid all the while. I have paid those raises in rates under protest.

"Mr. I. Carb was the local secretary of the local section of the Supreme Lodge, Knights of Pythias, at Ft. Worth Texas (witness was handed a paper). This is a card from Mr. I Carb showing receipts."

208 (Counsel for the plaintiff introduced the card above mentioned, showing the payment to the defendant of money on this policy, as follows:)

Plaintiff rests.

"Counsel for the defendant introduced in evidence the following testimony from the deposition of W. O. Powers, as follows: Beginning here and continuing to second paragraph on page seventy-one (71):

"I am acquainted with the resolution and the condition of the fourth class of the insurance department. The source of my information is the books and records of this office. Part of these records, particularly the membership and statistical.

Supreme Chancellor Davis was really the originator of the Endowment Rank—looked at the undertaking from a strictly fraternal and ritualistic standpoint. Doubtless many of the defective and un-

practical provisions of the law were due to that fact. He was at first inclined to rule that all members of the Order over fifty years of age, who were initiated prior to June 1, 1878, should be admitted to the Endowment Rank.

Although reference was made in his report to the Supreme Lodge regarding a graded rate, based on age at date of entry, he as well as other members of the Committee on Endowment Rank laws, gave no consideration to the mortuary tables. They were inclined to the opinion that the young member should be sufficiently charitable to let his overpayment be placed to the credit of the old member, whose payment was not equal to the cost of his risk.

209 While provision was made for medical examinations, it was of a purely perfunctory character, as will be readily observed from the copy of the application given in Chapter IV. The requirements for endowment rank membership were much the same as those for the Rank of Page, Esquire and Knight.

Article III, Section 3, of the Constitution of 1877, for Sections, reads as follows:

"The applicant may be received, considered by the Committee, the candidate balloted for and, if elected, the Rank conferred upon the same evening.

SEC. 4. Applicants for membership shall be balloted for by ball ballot. Should two black balls appear, the ballot shall be renewed immediately. Should two more black balls appear, on the second ballot, he shall be declared rejected, and no ballot taken in his case for a period of six months thereafter."

As this law stood, the Supreme Lodge seemed in reality bound by Section legislation. The moment the obligation was taken by a member he became endowed in the sum of \$1,000, \$2,000, \$3,000, and the Supreme Lodge was bound to pay one of these sums upon his death, although it might occur before he should receive his certificate of membership, and possibly before his application had reached the office of the Supreme Master Exchequer, yet he considered it of such vast importance that he intentionally violated this law in so far as it affected the age limit.

The fourth class was established in 1884, and the assessment plan supplanted by the Ante-mortem plan most of the members
210 transferring to this class. Members were assessed on a graded system of assessments, based upon the expectancy of life.

Members were transferred from first, second and third classes to the fourth class at original entry age. If transferred from the old classes prior to July 1, 1885, they were rated to August 1, 1888, based on original entry. From August 1, 1888 rated at age at transfer.

211 *Fourth Class Table of Rates in Force From — 1885, to
March 1, 1894.*

Age.	\$500. Amount.	\$1,000. Amount.	\$2,000. Amount.	\$3,000. Amount.
21	\$.35	\$.70	\$1.40	\$2.10
22 .....	.35	.70	1.40	2.10
23 .....	.35	.70	1.40	2.10
24 .....	.35	.70	1.40	2.10
25 .....	.40	.75	1.50	2.25
26 .....	.40	.75	1.50	2.25
27 .....	.40	.80	1.60	2.40
28 .....	.40	.80	1.60	2.40
29 .....	.40	.80	1.60	2.40
30 .....	.40	.80	1.60	2.40
31 .....	.45	.85	1.70	2.55
32 .....	.45	.90	1.80	2.70
33 .....	.45	.90	1.80	2.70
34 .....	.50	.95	1.90	2.85
35 .....	.50	.95	1.90	2.85
36 .....	.50	1.00	2.00	3.00
37 .....	.50	1.00	2.00	3.00
38 .....	.55	2.10	2.10	3.15
39 .....	.55	2.10	2.20	3.30
40 .....	.55	1.10	2.20	3.30
41 .....	.60	1.15	2.30	3.45
42 .....	.60	1.20	2.40	3.60
43 .....	.65	1.25	2.50	3.75
44 .....	.65	1.30	2.60	3.90
45 .....	.70	1.35	2.70	4.05
46 .....	.70	1.40	2.80	4.20
47 .....	.75	1.45	2.90	4.35
48 .....	.75	1.50	3.00	4.50
49 .....	.80	1.55	3.10	4.65
50 .....	.80	1.60	3.20	4.80

Special assessment #1 equal to one payment levied in July 1892.
Dues of 5 cents per thousand added March 1, 1894. Special assess-
ment #2 levied May 15, 1901.

*Fourth Class Table of Rates in Force from September 1, 1901, to
January 1, 1911.*

Age.	\$500. Amount.	\$1,000. Amount.	\$2,000. Amount.	\$3,000. Amount.
21	\$.45	\$.90	\$1.80	\$2.70
22 .....	.50	.95	1.90	2.85
23 .....	.50	1.00	2.00	3.00
24 .....	.50	1.00	2.00	3.00
25 .....	.55	1.05	2.10	3.15
26 .....	.55	1.10	2.20	3.30
27 .....	.55	1.10	2.20	3.30
28 .....	.60	1.15	2.30	3.45
29 .....	.60	1.20	2.40	3.60
30 .....	.65	1.25	2.50	3.75
212				
31 .....	.65	1.25	2.50	3.75
32 .....	.65	1.30	2.60	3.90
33 .....	.70	1.35	2.70	4.05
34 .....	.70	1.40	2.80	4.20
35 .....	.75	1.45	2.90	4.35
36 .....	.75	1.50	3.00	4.50
37 .....	.80	1.60	3.20	4.80
38 .....	.85	1.65	3.30	4.95
39 .....	.85	1.70	3.40	5.10
40 .....	.90	1.75	3.50	5.25
41 .....	.90	1.85	3.70	5.55
42 .....	.95	1.90	3.80	5.70
43	1.00	2.00	4.00	6.00
44	1.05	2.10	4.20	6.30
45	1.10	2.15	4.30	6.45
46	1.15	2.25	4.50	6.75
47	1.20	2.35	4.70	7.05
48	1.25	2.45	4.90	7.35
49	1.30	2.60	5.20	7.80
50	1.35	2.70	5.40	8.10
51	1.40	2.85	5.70	8.55
52	1.50	3.00	6.00	9.00
53	1.55	3.10	6.20	9.30
54	1.65	3.30	6.60	9.90
55	1.75	3.45	6.90	10.35
56	1.80	3.60	7.20	10.80
57	1.95	3.90	7.80	11.70
58	2.00	4.00	8.00	12.00
59	2.15	4.25	8.50	12.75
60	2.25	4.50	9.00	13.50

The rating at the age of 60 applies also to all ages above sixty.
Members rated at entry age instead of attained age.

Fourth Class Tables of Rates in Force January 1, 1911, and Still in Force.

Option "C," Monthly Payments per 4,000.

Age.	Monthly payment.	Age.	Monthly payment.
21	\$1.40	56	\$4.45
22	1.45	57	4.65
23	1.50	58	4.90
24	1.50	59	5.15
25	1.55	60	5.40
26	1.60	61	5.65
27	1.60	62	5.95
28	1.65	63	6.25
29	1.70	64	6.60
30	1.75	65	6.95
31	1.80	66	7.35
32	1.85	67	7.75
213			
33	1.90	68	8.20
34	1.95	69	8.65
35	2.00	70	9.15
36	2.05	71	9.70
37	2.10	72	10.30
38	2.15	73	10.95
39	2.25	74	11.60
40	2.30	75	12.35
41	2.40	76	13.15
42	2.50	77	14.05
43	2.60	78	15.00
44	2.70	79	16.10
45	2.80	80	17.30
46	2.90	81	18.65
47	3.00	82	20.15
48	3.15	83	21.85
49	3.30	84	23.80
50	3.45	85	26.10
51	3.60	86	28.80
52	3.75	87	31.90
53	3.90	88	35.50
54	4.10	89	39.65
55	4.25	90	44.60

The first accurate knowledge of the Mortuary Fund is that of December 31, 1901, which shows at that time a deficiency of \$34,959.06.

Mortuary Receipts and Disbursements Since Are —.

	Receipts.	Disb'ts.
Dec. 31-'02.....	1,642,688.64	1,432,940.41
" 31-'03.....	1,684,464.20	1,444,814.45
" 31-'04.....	1,731,215.52	1,500,481.15
" 31-'05.....	1,805,473.28	1,462,721.79
" 31-'06.....	1,952,386.98	1,595,052.41
" 31-'07.....	1,771,234.19	1,613,294.84
" 31-'08.....	1,172,436.37	1,401,160.61
" 31-'09.....	634,993.89	1,036,592.33
" 31-'10.....	518,235.37	849,344.41

Balance.

174,789.17
414,438.92
643,173.29
987,924.78
1,345,259.35
1,503,198.70
1,274,474.46
872,876.02
541,766.98

- 214 On March 1, 1894 rates were increased five cents per 1,000 and on September 1, 1901, N. F. C. Tables were adopted. Seven special assessments were levied in 4th Class as follows:

July 1892.
 May 1901.
 Feb. 1909.
 Sept. 1909.
 Mar. 1910.
 May 1910.
 July 1910.

Number of Members and Amount of Insurance in Fourth Class by Years.

	No.	Insurance.
1885	14,460	\$26,667,000
1886	15,762	34,188,000
1887	16,782	35,433,000
1888	18,046	41,893,000
1889	20,505	44,300,000
1890	23,403	50,300,000
1891	27,299	58,745,000
1892	30,230	64,800,000
1893	32,939	70,852,000
1894	36,416	76,434,000

1895	41,058	82,475,000
1896	46,912	90,821,500
1897	51,478	96,675,500
1898	54,527	100,180,500
1899	60,309	108,098,500
1900	66,561	116,363,500
1901	57,075	101,265,500
1902	60,710	103,711,000
1903	63,561	105,736,000
1904	68,203	109,787,000
1905	74,867	117,205,500
1906	81,819	125,445,000
1907	35,717	91,699,000
1908	31,263	53,461,500
1909	12,919	24,111,500
1910	8,784	16,996,500

The rates adopted in 1901, September, were the National Fraternal Rates. They represented the mortuary cost only and were not therefore loaded for expenses. The rates were not suitable or adapted to our needs for the reason that our mortality was in excess of that employed in the N. F. C. table. In addition, the mistake was made of applying the entry age instead of the attained age, and also by deducting 15% for expenses from the already inadequate rate made a still worse condition. As the rates were higher than those previously in force the funds for a time increased but afterward the inadequacy developed which was but natural to expect.

Fourth Class Mortuary Fund.

August 31, 1910.....	\$675,800.85
September 30, 1910.....	653,422.62
October 31, 1910.....	615,568.49
November 30, 1910.....	558,606.99
December 31, 1910.....	541,766.98
January 31, 1911.....	516,486.16
February 28, 1911.....	462,499.16
March 31, 1911.....	461,644.92
April 31, 1911.....	443,272.31
May 31, 1911.....	415,733.54
June 30, 1911.....	450,916.31
July 31, 1911.....	460,114.98
August 31, 1911.....	464,787.46
September 30, 1911.....	480,267.51

216 *Schedule of Membership, Amount of Insurance, Jan 1, 1907, Mortuary Receipts, Number of Deaths, and Losses Incurred at Attained Age During 1906, of the Insurance Department, Knights of Pythias.*

Attained age.	No. of members.	Amount of insurance.	Received in mortuary payments during 1906.	Average expectancy.	Payments by members during expectancy period.	No. of deaths during 1906.	Death losses incurred since 1906.
21.....	269	\$361,500	\$1,759.44	41.53	\$73,069.54	00	00
22.....	781	990,000	6,267.22	40.85	246,015.94	1	1,000
23.....	1,086	1,324,000	10,775.33	40.17	432,845.01	3	3,000
24.....	1,418	1,727,000	14,452.07	39.49	570,612.24	6	7,000
25.....	1,519	1,860,000	16,760.97	38.81	650,493.25	4	5,500
26.....	1,772	2,168,500	20,236.27	38.12	771,405.61	8	10,000
27.....	1,878	2,302,500	22,186.77	37.43	830,466.80	4	4,500
28.....	2,059	2,589,500	26,198.85	36.73	992,372.76	12	14,500
29.....	2,071	2,575,000	27,005.29	36.03	975,000.60	6	7,000
30.....	2,370	2,978,500	32,124.41	35.33	1,113,955.41	12	16,500
31.....	2,382	3,019,000	33,658.56	34.63	1,165,600.40	8	9,000
32.....	2,498	3,229,500	36,858.91	33.93	1,250,422.82	20	32,000
33.....	2,589	3,398,000	38,741.58	33.21	1,275,607.87	10	13,500
34.....	2,739	3,652,000	44,402.19	32.50	1,434,071.18	12	17,000
35.....	2,636	3,626,500	44,967.65	31.78	1,429,071.92	16	22,500
36.....	2,903	3,908,500	48,710.88	31.07	1,513,547.04	20	25,500
37.....	2,948	3,971,000	56,351.91	30.35	1,707,245.47	8	12,500
38.....	2,856	4,069,500	55,298.85	29.62	1,637,951.94	22	38,500
39.....	2,728	3,874,000	53,169.75	28.90	1,536,505.68	16	23,500
40.....	2,942	4,363,000	60,588.72	28.18	1,707,390.03	16	27,000

41.....	2,570	3,809,000	53,999.34	27.45	1,482,281.87	14	20,000
42.....	2,458	3,797,500	54,641.77	26.72	1,460,028.09	15	24,500
43.....	2,425	3,815,000	56,378.90	26.00	1,565,851.40	11	22,000
44.....	2,503	4,026,000	60,399.10	25.27	1,526,858.36	16	29,000
45.....	2,585	4,159,000	62,963.49	24.54	1,545,124.05	23	41,500
46.....	2,418	3,978,500	59,917.03	23.81	1,426,624.48	29	50,000
47.....	2,248	3,772,000	57,521.34	23.08	1,327,592.43	28	46,000
48.....	2,123	3,548,000	58,201.13	22.36	1,301,377.28	22	39,500
49.....	2,005	3,418,500	56,894.25	21.63	1,230,622.63	24	35,500
50.....	1,943	3,318,500	58,329.14	20.91	1,214,626.32	25	54,000
51.....	1,631	2,909,500	51,527.14	20.20	1,040,848.23	29	60,000
52.....	1,526	2,778,500	50,256.18	19.49	979,492.95	31	66,000
53.....	1,394	2,651,500	48,281.50	18.79	907,209.39	26	45,000
54.....	1,275	2,436,000	39,968.93	18.09	723,138.94	28	56,000
55.....	1,250	2,345,000	44,855.16	17.40	780,479.78	36	65,000
56.....	1,135	2,190,500	43,399.32	16.72	725,636.63	25	51,000
57.....	1,080	2,136,000	42,214.81	16.05	677,547.70	24	41,000
58.....	931	1,881,000	38,523.76	15.39	592,880.67	22	50,000
59.....	801	1,620,500	33,852.67	14.74	498,988.36	27	61,000
60.....	625	1,338,500	28,437.37	14.10	400,966.92	15	35,000
61.....	607	1,298,000	28,180.96	13.47	379,597.53	21	56,000
62.....	575	1,218,000	27,208.64	12.86	349,903.11	19	42,000
63.....	440	933,000	27,205.18	12.26	259,975.51	12	20,000
64.....	445	971,000	22,698.20	11.67	264,887.99	12	24,000
65.....	334	723,000	17,565.47	11.10	194,976.72	17	36,000

217	Attained age.	No. of members.	Amount of insurance.	Received in mortuary payments during 1906.	Average expectancy.	Payments by members during expectancy period.	No. of deaths during 1906.	Death losses incurred during 1906.
	66.....	287	635,500	15,800.25	10.54	166,334.64	14	33,000
	67.....	247	510,000	13,165.20	10.00	131,652.00	16	38,000
	68.....	218	479,000	12,694.47	9.47	120,216.63	14	35,000
	69.....	189	423,000	11,943.50	8.97	107,133.20	10	21,000
	70.....	191	434,000	12,800.04	8.48	108,544.34	10	22,000
	71.....	169	372,000	11,625.77	8.00	93,006.16	14	27,000
	72.....	159	362,500	11,575.79	7.55	87,397.21	10	23,000
	73.....	154	328,500	11,292.37	7.11	80,288.75	15	35,000
	74.....	110	245,000	8,536.07	6.68	57,020.95	7	15,000
	75.....	89	187,000	7,144.02	6.27	44,792.01	11	22,000
	76.....	73	155,000	6,163.04	5.88	36,238.68	6	11,000
	77.....	46	88,000	3,857.84	5.49	21,176.54	3	6,000
	78.....	30	54,000	2,754.20	5.11	14,073.96	3	3,000
	79.....	25	48,000	2,502.25	4.74	11,860.67	5	9,000
	80 and over.	34	64,000	3,760.22	4.39	16,507.37	9	20,000
		81,819	\$125,445,000	\$1,903,451.53		\$45,265,377.96	902	\$1,680,000

218 Fifth Class was established January 1, 1907.

Fourth Class had then 81,819 members carrying \$125,-445,000 insurance. Mortuary Fund was \$1,345,259.35. American Experience Tables at $3\frac{1}{2}\%$ table of rates for the 5th Class.

First. On January 1, 1907, there were 81,819 members of the fourth class. The amount of their certificates was \$125,445,000. The net mortuary fund on hand to the credit of these members was \$1,189,277.53. This fund, together with interest accretions to be earned by loaning it out in the future, and together with the members payments to be made in the future, was all that could be counted on to pay the certificates as they would mature. While no valuation of these 81,819 certificates was made for the purpose of determining what amount of reserve there should have been in addition to the \$1,189,277.53 we know that it should have been several million dollars, for we do know the exact age of each of the 81,819 members and how many years each of said members was expected to live according to the Mortuary Tables and, while it is not a scientific way of determining the required reserve, it gives us some idea of the inadequacy of the \$1,189,277.53, as a reserve, to consider the fact that by using the expectancy of — according to the standard Mortality Table and assuming each member to live his full expectancy and pay during the whole of his life, the same rates as he was paying, the aggregate of all the payments would be only \$45,265,377.96, while the amount that would be due on the certificates would be \$125,445,000.00, thus showing a deficit of \$80,179,622.04. With interest earnings of say \$10,000,000 and the \$1,-

189,277.53 money on hand all added to the \$45,265,377.96
219 we would still be short \$68,990,344.51. But suppose that it be claimed that the members would live longer than expected—and thereby pay in more than the \$45,265,377.96—suppose we double it—making their contributions of monthly payments equal \$90,530,755.92. And, further, assume that the Board of Control could, by some wonderful exercise of business acumen and ability increase the sum with interest earnings amounting to \$20,000,000, which, when added to the above and the amount on hand would make the immense sum of \$111,720,033.45. Remember, that to have raised this sum would have involved the doubling of the member's payments; and still it would have been \$13,724,466.55 short of being enough to pay all the certificates.

It is not clear that quite a few certificates would not be paid? It is not contended by the writer that the above illustration is scientific. It is not. The true way of arriving at the exact amount of reserve required to be on hand at any given time is by valuing the certificates. It is axiomatic in the science of insurance that the difference between the value of the Society's promises in the aggregate to its members, and the aggregate of the members' promises to it, must be on hand at all times as a reserve. Members of the fourth class were permitted to transfer to the fifth class without examination or other expense from January 1, 1907 to March 31, 1909. From April 1, 1909 to the meeting of the Supreme Lodge in August 1910 an examination was required. Since August 1910 no examination necessary.

The fifth class was established on adequate rates for the purpose of enabling the fourth class members to transfer to the fifth class and from that time on pay adequate rates. Every member who transferred his membership relieved the fourth class of that liability, and also left his share of the Mortuary fund of the Fourth Class to help care for the remaining members of that class. Although 55,000 members transferred to the fifth class, it was still found that the rates and mortuary fund of the fourth class would be insufficient to meet the liabilities of the remaining members of the fourth class.

August 31, 1910, 11,322 Members in Fourth Class. Plaintiff was one.

Liabilities upon certificates 8-31-'10.....	21,529,000.
Mortuary Fund 8-31-'10.....	675,800.85

Mortuary Fund decreased from January 1, 1907 to 8-31-'10 as follows:

Increased 12-31-'06 to 12-31-'07.....	\$157,939.35
Decreased 12-31-'07 " 12-31-'08.....	228,724.24
" 12-31-'08 " 12-31-'09.....	401,598.44
" 12-31-'09 " 8-31-'10.....	197,075.17

Net Decrease..... \$669,458.50

Fourth Class Mortuary Fund Jan. 1, 1911.....	\$541,766.98
" " Membership " " ".....	8,784
" " Insurance in force.....	\$16,996,500.00

The income derived from assessments together with interest earnings fell far below amount necessary to meet death claims.

221	Assessments.	Rec. from int.	Paid for death clms.
1906	1,903,451.53	43,328.47	1,593,644.80
1907	1,732,375.66	38,858.53	1,613,294.84
1908	1,121,932.88	47,705.38	1,399,125.44
1909	597,058.77	36,735.12	1,035,192.23
to 9-31-1910.....	374,235.74	13,905.23	583,255.96
8-31-'10 to 12-31-'10..	120,721.34	10,911.56	263,352.94

The years ending Dec. 31, 1906 and 1907, the amount received from assessments of the fourth class members exceeded the amount paid out for death claims, but years ending Dec. 31, 1908-1909 and to August 31, 1910, amount paid for death claims exceeded amount received from assessments.

In 1906 Increased.....	353,135.20
1907 "	157,939.35
1908 Decreased.....	229,487.18
1909 "	401,398.34
Dec. 31, 1909 to 8-31-'10 Decreased.....	195,114.99
Aug. 31, 1909 to Dec. 31, 1910 "	131,720.04

	Assessments.	Rec. from int.	Rec. for death clms.
1906	1,903,451.53	43,328.47	1,593,644.80
1907	1,732,375.66	38,858.53	1,613,294.84
1908	1,121,932.88	47,705.38	1,399,125.44
1909	597,058.77	36,735.12	1,035,192.23
to 8-31-'10.....	374,235.74	13,905.23	583,255.96

August 31, 1910.

Liabilities fourth class members..... \$21,529,000.00

Amount of assessments were less than death losses incurred. Mortuary Fund was \$675,800.85 and was decreasing at this time about \$60,000.00 monthly.

222 *Fourth Class Membership and Insurance by Attained Age*
August 31, 1910.

Attained age.	No.	Amount.	Attained age.	No.	Amount.
25.....	4	6,000	55.....	316	610,000
26.....	16	22,500	56.....	328	644,500
27.....	23	33,000	57.....	352	680,500
28.....	44	61,500	58.....	340	689,000
29.....	31	36,500	59.....	367	706,000
30.....	53	68,000	60.....	378	749,500
31.....	56	68,000	61.....	426	839,500
32.....	66	79,500	62.....	412	835,000
33.....	56	74,500	63.....	404	820,000
34.....	89	115,500	64.....	381	782,500
35.....	79	99,500	65.....	366	784,500
36.....	85	120,500	66.....	372	794,500
37.....	114	168,500	67.....	289	628,000
38.....	128	177,000	68.....	278	605,000
39.....	140	199,000	69.....	219	496,500
40.....	161	228,500	70.....	205	438,500
41.....	164	244,500	71.....	175	358,000
42.....	169	259,500	72.....	166	362,000
43.....	187	309,500	73.....	137	298,500
44.....	252	421,000	74.....	125	286,000
45.....	229	405,500	75.....	112	253,500
46.....	251	428,000	76.....	96	218,000
47.....	229	410,000	77.....	97	210,000
48.....	263	477,500	78.....	67	145,000
49.....	310	564,000	79.....	64	137,000

50.....	309	587,000	80.....	40	85,000
51.....	304	568,500	81.....	25	53,000
52.....	302	545,500	82.....	14	23,500
53.....	309	582,500	83.....	9	5,000
54.....	329	613,500	84.....	3	5,000
			85.....	0	00,000
			87.....	2	2,000
Total		11,322	21,529,000		

On August 31, 1910 fourth class Mortuary Fund
 was \$675,800.85
 Reserve which should have been on hand, about... \$7,000,000.00
 On August 31, 1910 the fourth class Mortuary Fund
 was \$675,800.85
 Outstanding Insurance in that class..... \$21,529,000.00

223 Amount received from assessments was less than death losses incurred. Mortuary Fund was decreasing at this time about \$60,000.00 monthly.

Legislation adopted by the Supreme Lodge was recommended by Actuary S. H. Wolfe of New York. I believe Actuary Henry Moir of New York was also consulted.

When the N. F. C. Table of rates was put in force in September 1901, members were dated at their entry age instead of their attained age. This was one reason why it was again necessary to raise the rates on January 1st of this year. If the entry age had been applied on January 1st instead of the attained age, it would have been absolutely necessary to re-rate again a little later on.

The death losses from August 1910 up to January 1, 1911, exceeded the receipts from assessments in the fourth class and the Mortuary Fund showed a marked decrease each month.

I have been engaged in the Fraternal Insurance Business for about eighteen years. Have been with the Insurance Department of the Knights of Pythias since June 1903.

In August 1910 and up to January 1, 1911; taking into consideration all the circumstances and conditions then surrounding the fourth class of the Insurance Department of the Knights of Pythias, and the future prospects and probabilities of the increase and decrease belonging to said class; and taking into consideration plaintiff's respective age, his life expectancy, the amount of the certificate, the amount of the mortuary fund of the fourth class, the amount that might be realized in the future from assessments levied upon the members of said class, any interest accumulations and all the facts and circumstances connected with the condition and future

224 prospects of said fourth class; considering all of said facts the value of the certificate of S. Mims, provided he continued to pay the rates enforced prior to August 1910, would be \$211.00.

The legislation adopted by the Supreme Lodge—order to provide sufficient funds to meet the liabilities as they matured. The policy of collecting extra assessments was a short-sighted one, for while it

provided relief, did not take care of the future and was the means of driving a large number of the younger members out of the Society and left therefore a larger proportion of the older members.

In this connection let me cite the fact that the lapse ratio during the years 1909 and 1910, during which period five extra assessments were called, increased four times over the normal lapse rate, as is evidenced by the following figures:

Year 1902.	Ration of Lapse.....	6.93
1903.	" " "	7.49
1904.	" " "	6.54
1905.	" " "	6.42
1906.	" " "	6.39
1907.	" " "	6.35
1908.	" " "	5.09
1909.	" " "	21.07
1910.	" " "	22.80

By a comparison of the mortuary receipts from members and the deaths occurring it will be readily seen the fund was rapidly decreasing by reason of the excess of the amount paid over the receipts. The average age of the remaining members in the fourth class on dates given is as follows:

January 1, 1911.....	56.38
March 31, 1911	59.36
June 30, 1911.....	59.16
September 30, 1911.....	59.50

225 Under the annual valuation of the certificates if it develops that there had been overpayments on the part of the members, there is a provision of the laws requiring the excess to be returned by means of waived payments, the same as being followed in the fifth class.

It would have been impossible to pay the outstanding certificates at the rates in force prior to January 1, 1911. As to whether or not each of the plaintiffs' certificates were of any value in case there had been no increase in the rates, it would depend entirely on whether they die before the fund was exhausted. Those who were fortunate, or perhaps unfortunate, enough to live beyond that period would undoubtedly find their certificates of questionable value.

Counsel for the defendant offered in evidence the following portions from the Amendments of the Supreme Statutes affecting the insurance department, Knights of Pythias, enacted by the Supreme Lodge at the Biennial Convention of 1910:

Part of Section 468.

If any provision or paragraph of this section shall for any reason be held invalid, the remaining portions of the section shall be unaffected thereby.

SEC. 390. This Society in its insurance department is a fraternal beneficiary society. Its purposes, in accordance with its charter, organization and plans, are to provide for and pay benefits to the beneficiaries of such deceased members in good standing in the insurance department of the Supreme Lodge, Knights of Pythias, and in good standing in a subordinate lodge of said order, and to pay to members in like good standing benefits in case of sickness, temporary or permanent physical disability, as may be provided in its laws.

Counsel for the defendant offered in evidence the original application for membership in the Endowment Rank, as follows:

Application No. —.

Application for Membership in Endowment Rank, Knights of Pythias.

GALVESTON, TEXAS, April 11, 1879.

The undersigned is desirous of becoming a member of Section 278 of the Endowment Rank of the Order of Knights of Pythias. This application will form a part of the contract, if accepted.

Name at Full Length, Shadrick Mims, Jr.

Residence, Galveston, Texas.

Occupation, Accountant.

Post-Office, Galveston, Texas.

2. Place and date of Birth?

—. Vernon, Alabama, 1837, June 6th, age 42.

3. Are you now in good health?

A. Yes.

4. Have you ever had any serious illness or personal injury? State particulars, time, name, and residence of physicians.

A. None.

5. (a) Have you ever had spitting of blood, Consumption, Bronchitis, Asthma, Aneurism, Gout, Rheumatism, Insanity, Paralysis, Apoplexy, Scrofula, Spinal Disease, Fistula, Rupture, Dropsy, Liver Complaint, Disease of the Kidneys or Bladder, or any Disease of the Heart?

(b) Or be-n subject to Cough, Expectoration, Difficulty or Breathing or Palpitation?

(c) Dispepsia, Dysentery, Billious Colic, or Diarrhœa?

227 A. (a) No.

(b) No.

(c) No.

6. (a) Are your habits correct and temperate?

(b) Have they always been so?

(a) Yes.

(c) Yes.

7. Are your parents living?

(a) Their ages and state of health.

(b) If dead at what ages, and of what disease did they die?

Answer. Father, Yes, 75 years. Mother, Living, 71 years old.

8. How many brothers and sisters have you had? State the number living, their ages and state of health. The number dead—age and cause of death?

Answer. 4 Brothers. Had four Brothers, 2 now living aged 38 and 44. Health perfect. I dead, aged 40 Pneumonia.

5 Sisters. Four living aged 46, 36, 32 and 30. One died April 28th. Child birth.

9. Have either of your parents, brothers or sisters ever had Consumption, Scrofula, Insanity, or any hereditary disease?

A. No.

10. What class do you desire to enter?

A. Both Classes.

11. State definitely to whom you wish the benefit payable, and relationship to you.

A. My wife Mary J. Mims.

228 I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained.

(Signed)

S. MIMS, JR.,

Member of Humboldt Lodge No. 9, K. of P.

City of Galveston, State of Texas.

Fee enclosed \$3,000.

Endowment Rank conferred 11th day of April, 1879.

(Signed)

P. S. WREN,

Secretary and Treasurer.

Certificate of Lodge.

This certifies that Bro. S. Mims, Jr., is a member of the Knights Rank of Humboldt Lodge No. 9 of the Grand Jurisdiction of Texas, City or town of Galveston in good standing, and that his dues are paid to April 1, 1879.

(Signed)

CHAR. WORTH,

Master of Finance.

Counsel for the defendant offered in evidence answers of witness W. O. Powers to interrogatory No. 25, as follows:

Attached hereto and a part of my answer to this interrogatory is a true and correct copy of the amendments of the Supreme Statutes affecting the insurance department as enacted by the Supreme Lodge at the Biennial Convention of 1910, and also a true and correct copy of the resolution passed by the Board of Control and having reference to Option J of Supreme Statute #468. I am not a member of the Board of Control, but as General Secretary of the Insurance Department, I am required to attend the meet-

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ings of the Board and to keep its minutes. I also have charge of the books and records of the Board.

The following is a true and correct copy of the Resolution passed by the Board of Control at a meeting held January 30, 1911, and having reference to what is known as Option "J" of Supreme Statute #468:

Paragraph "J."

Mr. Brown, on behalf of the special committee appointed to formulate a plan putting into operation the provisions of Option "J" of Supreme Statute 468, submitted the following report and asked that it be adopted.

Old Age Disability, and Other Benefits.

Should any member of the fourth class from or after January 1, 1911, who has heretofore or shall hereafter attain the age of seventy years and become permanently disabled, either as the result of disease, accident or old age, he shall have the right, while in good standing, to make application for a disability settlement to the Board of Control, upon proper blanks to be furnished the applicant, setting forth the nature of his disability and the cause thereof, together with such other additional information as may be required.

Upon receipt of the application for a disability settlement, the Board shall investigate the same, fully and completely and determine the right of each member applying for the benefit, the
230 amount of the same, not exceeding in any case \$100.00 for each \$1,000 of insurance in force and to make all needful agreements with the member so applying with respect to such payments, as may be made hereunder, and, it may, if desired by the applicant, accept the surrender of his certificate and terminate his connection with the Insurance Department.

Any member of the fourth class from and after January 1, 1911, may apply to the Board of Control for any other benefit provided for in Paragraph "J". Upon receipt of such application, the Board shall investigate the same and determine the amount of such benefit and provide for its allowance upon such needful agreements and conditions as may be entered into by and between the said member and the Board. In arriving at the amount of benefit that may be allowed each applicant, the Board shall take into consideration, in addition to other facts, the contributions of the member so applying to the mortuary fund of the fourth class and the necessity of keeping on hand a sufficient amount of the mortuary funds of the fourth class to fully protect outstanding liabilities upon fourth class certificates, the purpose being in allowing such benefits under Paragraph "J" to allow to each member applying for such benefits all relief and assistance that can be equitably and justly allowed him without jeopardizing the safety of the certificates of other members of the fourth class who keep the certificates issued to them in force.

The following motion was made by Mr. Duval: "I move that the report be received and adopted."

231 Motion seconded by Mr. Davis.

And upon roll call, was adopted by the following vote:

George M. Hanson, Aye.
Thos. J. Garling, Aye.
Henry P. Brown, Aye.
C. F. A. Neal, Not voting.
U. S. G. Cherry, Absent.
Chas. S. Davis, Aye.
William Ladew, Aye.
Wm. J. Duval, Aye.

Defendant then introduced in evidence the answer of W. O. Powers to Interrogatory No. 26, as follows:

Plaintiff could have retained his insurance in the insurance department by accepting one of the options provided by the Supreme Lodge in August 1910. In my opinion the rates adopted in 1910 were adequate and all claims would have been ultimately paid in full. Plaintiff had the privilege of transferring to the fifth class without examination or other expense by simply paying the rates in force in that class.

The N. F. C. Rates which were in force prior to January 1, 1911, were not adapted to our needs as our mortality experience was in excess of that employed in that Table. By rating the members at their entry ages, instead of attained ages, and deducting 15% from the already inadequate rates for expenses, it would have been impossible to mature the contracts. The experience of levying extra assessments showed that relief could not be secured from that source, as the lapse rate increased four times the usual condition.

232 Having in mind past experience, I believe that the only solution of the problem was to rerate all members at their attained ages as was provided for under the legislation adopted in August 1910.

Counsel for the defendant offered in evidence a portion of answer of W. O. Powers to cross interrogatory No. 1, as follows:

The following is a true and correct copy of S. S. 390 and 391, Laws of 1908.

S. S. 390, Sec. 3. This Society in its insurance department is a fraternal beneficiary society. Its purposes in accordance with its charter, organization and plans, are to provide for and pay benefits to the beneficiaries of such deceased members of the Order of Knights of Pythias as may die while members in good standing in the insurance department of the Supreme Lodge Knights of Pythias.

S. S. 391, Sec. 4. This Society in its insurance department shall be composed of an unlimited number of members, organized into subordinate bodies known as Sections, and whose obligations and rights and the rights of their beneficiaries are limited by the class or plan to which each member belongs. Membership in the insurance

department can be attained only by members in good standing in a subordinate lodge of this society, and who possess the following qualifications, viz:

Counsel for the defendant offered in evidence answer of witness W. O. Powers to cross interrogatory No. 8 as follows:

At the time J. A. Hicks and S. Mims became members of the 1st and 2nd classes there were but the two classes. At the time C. A. Gill became a members of the 1st and 2nd classes there were three classes. The third class was established in 1880. The laws provided that if on the payment of a death claim a sum sufficient to meet the next maturing claim did not remain to the credit of the mortuary fund, then in that event the S. M. of E. should call another assessment of \$1.00 from each member for the mortuary fund and 25 cents for the expense fund. The amount of the assessment being the same in each of the three classes.

In 1888 the rates upon all members were advanced to their age of entry into the fourth class, and in 1892 a special assessment was levied. In 1894 the members were classified by occupation and the rates attempted to be adjusted thereto. There was also added annual dues to the extent of sixty cents per thousand of insurance. In August 1910 the business of the department was divided into four classes, viz:

First Class.

Second Class.

Fourth Class and Fifth Class.

The first two classes have but very few members and are not now in active operation, no members having been admitted to same since 1884. In August 1910 the rates in force in the fourth class were those in force since September 1901. Three extra assessments had been levied in 1910 prior to the month of August of that year.

Counsel for the defendant offered in evidence a portion of the answer of the witness W. O. Powers to cross interrogatory No. thirteen as follows:

Rec'd from all sources 4th Cl. 1-1-10 to 8-1-10.....	\$388,140.97
Paid out in death losses " " " " to 8-1-10.....	583,255.96

Short.....	\$195,114.99
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234 Counsel for the defendant offered in evidence a portion of the answer of the witness W. O. Powers to cross interrogatory No. eighteen, as follows:

For the month of July 1910, there was received from members in the Fourth Class \$56,812.38. This was made up of one regular monthly assessment and one special assessment equal to one regular. Death losses for July 1910 were \$78,912.10.

Counsel for the defendant offered in evidence answers of witness W. O. Powers to cross interrogatory No. 27 and 28, as follows:

The legislation passed at the August 1910 convention of the Supreme Lodge with reference to raising the rates applied only to

members of the fourth class. The rates in force in the fifth class are considered adequate, being based upon the American Experience Tables with an interest assumption of $3\frac{1}{2}\%$. As the mortuary funds of the two classes are kept separate, an increase in the fifth class rates would be of no benefit to the members of the fourth class.

The original copies of the laws and proceedings of the Supreme Lodge are not in the custody of the Board of Control but are retained by the Supreme Keeper of Records and Seal.

Counsel for the defendant offered in evidence a part of the laws of 1880, as follows:

These laws may be altered or amended at any regular session of the Supreme Lodge Knights of Pythias.

235 Counsel for the defendant offered in evidence the following from the deposition of S. H. Wolfe, taken on the 18th day of November 1911:

My name is S. H. Wolfe, my age is 38, I live in the Borough of Manhattan, City of New York, State of New York, and I am by occupation an actuary.

I have been engaged in actuarial work for about eighteen years; I was educated in the Public Schools of Baltimore and New York and the College of the City of New York. I am the author of "Inheritance Tax Calculation," Modified Premiums and Costs, "The Examination of Insurance Companies" and the compiler of "Investment Directory-Insurance Companies." I have done actuarial or examining work for a number of the Insurance Departments, among others, Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, Virginia, North Carolina, Georgia, Texas, Tennessee, Kentucky, Ohio, Michigan, Minnesota, Nebraska, Colorado and California. I have made a great many examinations for the Insurance Department of the State of Texas and have had in charge at various times the determination of actuarial questions which have come before it.

I am not a member of the Order of Knights of Pythias; I was consulted by the Insurance Department of the Knights of Pythias in 1906, and have been in frequent consultation with its officers since that date. My first work was in the investigation of the Insurance Department's condition, the formulation of the rates intended to correct

236 existing evils, the valuation of its certificates in order to determine whether the remedy suggested was efficacious, the annual accounting prescribed by its laws, the determination of the number of assessments which could safely be waived, and in short all actuarial matters which have arisen since 1906 to the present time.

By reason of the connection outlined in interrogatory No. 3, I am acquainted with the history of the Insurance Department, the fourth and fifth classes, the outstanding liabilities in said fourth class at various and frequent intervals since 1906, the outstanding liabilities of the fifth class at various and frequent intervals since 1907 and the rates of assessments charged the members in each of the foregoing classes at all times since 1906. I am also acquainted in a general

way with the history of the first and second classes, but as there was practically no members remaining in those classes at the time of my investigation, there was no necessity for my taking them into account.

I have been consulted upon numerous occasions as an actuary by the officers of the insurance department for the purpose of determining the reasonableness of the rates of assessments levied upon the fourth and fifth class members.

I am familiar with the history of the fourth class of the insurance department, Knights of Pythias, and with the rates paid by the members of that class, the amount of the mortuary fund of said class from January 1910 to the date of the meeting of the Supreme Lodge and the amount of the outstanding liabilities of said class during the same time. I am familiar with the rates of assessment levied upon mem-

237 bers of the fourth class prior to and at the time of the meeting. I was consulted as an actuary as to the necessity for, and the reasonableness and fairness of the rates fixed by the governing body of the Supreme Lodge at its meeting in Milwaukee in July 1910, and was consulted as to the necessity of the adoption of the laws and rules adopted by the Supreme Body at that convention.

In my opinion as an actuary, it was necessary for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims.

In my opinion the action taken by the Supreme Lodge at its convention in 1910 was not only reasonable and fair, but was absolutely necessary to enable the beneficiaries to receive the amounts of the certificates when they became due. This conclusion is based upon my careful study of the assessments then being paid by the members in the fourth class, the mortality experienced by said class, and the deficiency in the funds which the fourth class should have had in its mortuary fund if the rates were not to be increased.

I have kept track of the progress of the fourth class and the fifth class month by month since 1908, and at the end of 1909 made a valuation of the outstanding insurance in the fourth class. I found

238 that the amount of the outstanding certificates issued and held by members of the fourth class at the end of 1909 was \$24,539,000, and that the fourth class should have in its mortuary fund at that time over \$7,000,000, if the assessments were to be continued without any increases in the future. I am unable to state the numbers of members in the fourth class, as in the determination of the value of the certificates the amount of the insurance, and not the number of members, is the pertinent factor, but the number of members and their attained ages can be easily and authoritatively determined from the exhibit filed by the insurance department, Knights of Pythias with the insurance department, State of

Texas, said information being set forth at length in the sworn reports. The amount of the mortuary fund in the fourth class at the end of June 1910 was \$723,000 and at the end of July 1910 \$700,930.

Taking into consideration the amount of the outstanding liabilities upon certificates issued by the said fourth class, the amount of the mortuary fund on hand at the time the laws were enacted by the Supreme Lodge, the number of members of said fourth class and their respective ages at said time, the amount of assessments that could be collected in the future on the old rates, I am of the opinion that the action taken by the Supreme Lodge in increasing the assessments in the fourth class, was reasonable, absolutely necessary and equitable to the members of said fourth class. I arrived at that conclusion after a careful study of the conditions surrounding the fourth class, whereby it so developed that the rates had never been computed for

various reasons, and were insufficient to continue the payments
 239 of death claims as they matured in the future, and that action similar to that taken by the Supreme Body was absolutely necessary if the insurance department was to be continued. Taking into consideration the condition of the fourth class, the decrease of said mortuary fund of the fourth class, and the condition of the mortuary fund of the fourth class prior to and at the time of the convention in August 1910 of the Supreme Lodge, and taking into consideration the probable deaths that would occur by reason of the ages of the members of the fourth class in the future and the length of time they would be expected to live, and taking into consideration all the facts and circumstances, which are known to me, as to the rates of assessments and mortuary fund, outstanding liabilities, and further facts and circumstances pertaining to said fourth class membership of the insurance department; taking into consideration all those facts, it is my opinion that the action taken by the Supreme Lodge in increasing the assessments in the fourth class were reasonable, absolutely necessary and equitable to the members of said fourth class. The application of the increase was equitable and made with absolute fairness as between the members of the fourth class.

One of the first acts when I was consulted in 1906, was to carefully examine the early history of the insurance department, in order that I might determine the adequacy of the rates then being charged. I found that the insurance department Knights of Pythias, in common with practically all assessments and fraternal organizations, was

started by men unfamiliar with the science of life insurance,
 240 and who failed to take into consideration the fact that the cost of furnishing insurance protection did not remain stationary, but increased as the members became older. I found that the first change was made in 1894, a wrong principle having been adopted for determining the ages of the members and therefore the rates charged were again inadequate. It became necessary, therefore, in 1901 to again make a change, but at that time three serious blunders were made, all of them resulting in the levying of assessments upon too low a scale. Those mistakes may be classified as follows:

First. The rates are based upon a table of mortality (the National Fraternal congress Table), which was inadequate, did not represent the mortality of the Knights of Pythias, and was never intended to serve as a basis for the readjustment of rates.

Second. In rerating the members they were taken as of their ages at entry instead of at their ages at the time of the rerating, no reserve fund having been accumulated to take care of this difference in age.

Third. No allowance was made for the expenses of the organization, said expenses being defrayed by a percentage of the assessments collected, which assessments were inadequate for mortuary purposes alone.

These were the conditions which confronted the Board of Control in 1906, and as a result of the investigation which I made at that time, I had no hesitancy in pointing out the early disintegration of the Insurance Department which was bound to occur if the rates were not changed. I have no hesitancy in stating that if the fifth class had not been established, the fourth class would have been unable to keep up as long as it has done. Notwithstanding the levying of additional assessments, the amount in the
241 fourth class fund was steadily decreased, the amounts in said mortuary fund at the end of each month since December 1908, being shown in the following table:

December 31, 1908.....	\$1,274,474
January 31, 1909.....	1,217,012
February 28, 1909.....	1,189,247
March 31, 1909.....	1,176,096
April 30, 1909.....	1,143,010
May 31, 1909.....	1,061,920
June 30, 1909.....	1,037,186
July 31, 1909.....	1,003,178
August 31, 1909.....	992,329
September 30, 1909.....	982,106
October 31, 1909.....	967,790
November 30, 1909.....	939,279
December 31, 1909.....	872,876
January 31, 1910.....	848,063
February 28, 1910.....	823,769
March 31, 1910.....	807,995
April 30, 1910.....	819,810
May 31, 1910.....	756,981
June 30, 1910.....	723,030
July 31, 1910.....	700,930

Every one familiar with the subject of insurance will recognize that as a member becomes older, the amount which the insurance department ought to have on hand to protect his contract becomes larger; instead of the mortuary fund being a diminishing quantity, therefore, it should have increased from month to month and the fact that it has decreased so markedly (after making due allowance

for the decrease in insurance), shows the necessity for the action taken by the Supreme Body at its meeting in 1910. I have no hesitancy in stating that the rates paid by the members of the fourth class prior to the adoption of the regulations in July 1910 were insufficient to justify the hope that the older members would receive the insurance protection when they needed it most, and were unable to obtain insurance from other organizations. As a matter of equality and justice therefore, it became absolutely necessary to
 242 devise some plan whereby each certificate would become absolutely safe.

From the foregoing answers you will see that I have been in close intimate touch with the actuarial affairs of the insurance department of the Order of the Knights of Pythias since 1906, that it was upon my advice that the fifth class was created and that the rates of assessments, levied upon the fourth class by the Supreme Lodge at its convention in 1910 were changed. It was upon my advice and recommendation that the present rates in the fourth class were promulgated at that time (1910), and the options offered to the members of said class were prepared and calculated by me. I know these rates and options to be reasonable, necessary, just and impartial.

The condition of fraternal insurance organizations in this country for a number of years has been very unsatisfactory. The attempt to furnish insurance at less than cost has naturally resulted in failure, and in consequence various attempts have been made to remedy the defects in the plans under which the societies were operating; in a general way it may be stated that the assessment rates charged by these fraternal organizations to which I refer have one feature in common with the assessments charged by the fourth class of the Knights of Pythias, viz: They were inadequate. The attempts to correct this unfortunate condition have been along three lines:

First. Additional Assessments were levied.

Second. The assessments were increased, but not enough.

Third. The assessments were made adequate.

243 The first method has proven most unsatisfactory. Theoretically an assessment company or a fraternal organization can always get enough funds to pay its death claims by levying additional assessments if necessary. In actual practice this rapidly brings about a disintegration of the organization, as the members in good health refuse to meet the extra assessments, drop their certificates and leave behind a mass of moribund risks, the mortality upon which rapidly rises to the point where nobody is willing to pay an adequate rate.

The second method has been adopted by a great number of organizations and may be compared to taking two bites of a cherry. While the immediate necessities may have been met, the evil day is merely postponed and the organizations will have to go through the throes of a rerating at some future time. The third method has been adopted by a small number of organizations, among them the defendant in this action, and this is the only satisfactory way of en-

abling the beneficiaries of every deceased member to receive the face value of the insured's certificate. In no other way can absolute justice be done each member.

In my opinion as an actuary no future growth in membership under the fourth class table of assessments, even if supplemented by the levying of additional assessments, could have enabled the defendant to meet its liabilities as they accrued. For the reasons aforesaid, it was necessary in my opinion to re-rate the membership in the way in which it was done by the Supreme Lodge at its meeting in August 1910. The history of fraternal insurance in this country is filled with examples of the failure of any method to correct the evil of inadequate rates in any other way than by the raising of assessments to an adequate basis. This subject has been given much thought by actuaries in this country, and I have devoted considerable attention to it owing to my connection with the various departments, as a result of my examination of a great number of fraternal organizations and as a result of my being called upon to advise a number of such organizations.

Upon the assumption stated, I am of the opinion that on January 1st, 1911, the certificate of S. Mims had absolutely no value owing to the fact that a number of years—

245 Assuming that the plaintiff S. Mims, on April 11, 1879, made application for first and second class certificates, and that at said time the age of the said S. Mims was forty-two years old, and assuming that a certificate for \$1,000.00 in the first class and \$2,000.00 in the second class were issued to the said Mims on April 30, 1879, and assuming that the said Mims surrendered his said certificate in the first and second classes and applied to enter the fourth class on May 7th, 1885, and assuming that he obtained a certificate May 29th, 1885 in the fourth class for \$3,000, and assuming that the said Mims paid the assessments levied against him up to January 1, 1911, according to the rates fixed in said first, second and fourth classes, and assuming for the sake of argument that the action of the Supreme Lodge in August 1910, amounted in law to a repudiation of this contract with the said plaintiff S. Mims and entitled him to recover his said damages, and that the measure of said damages was the value of the certificate held by him in the fourth class, either in August 1910 or January 1, 1911; and taking into consideration all the facts and circumstances as to the condition and future prospects of the fourth class and all other facts and circumstances known to me, which should be considered by a capable actuary in arriving at his opinion and conclusion, I am of the opinion that on January 1, 1911, the certificate of S. Mims had absolutely no value owing to the fact that

246 for a number of years said Mims has been contributing considerably less than the cost of furnishing his insurance. This can be seen by the following table showing the amounts paid by him and the cost of providing for \$3,000 of protection:

Year.	Amount Paid.	Cost.
1885.....	\$28.80	\$21.90
1886.....	43.20	39.33
1887.....	43.20	41.34
1888.....	47.70	43.62
1889.....	54.00	46.17
1890.....	54.00	48.99
1891.....	54.00	52.20
1892.....	58.50	55.71
1893.....	54.00	59.67
1894.....	55.50	64.02
1895.....	55.80	68.82
1896.....	55.80	74.16
1897.....	55.80	80.07
1898.....	55.80	86.64
1899.....	55.80	93.87
1900.....	56.80	101.82
1901.....	71.25	110.61
1902.....	88.20	120.39
1903.....	88.20	131.13
1904.....	88.20	142.95
1905.....	88.20	156.00
1906.....	88.20	170.28
1907.....	88.20	185.97
1908.....	88.20	203.01
1909.....	102.90	221.19
1910.....	110.25	240.54

The history of Mims's certificate in the first and second classes has been ignored as it is a well established fact that the contributions at that time were insufficient to pay the cost of insurance.

Cross-examination:

My knowledge of the history and condition of the insurance department of the Knights of Pythias was derived not from data and records submitted to me, but from the inspection and examination of them, which was made by me upon frequent visits to the Home Office in Chicago and in Indianapolis. The records constituting the data examined were numerous and voluminous.

247 My testimony as to the liabilities of the members of the fourth class upon the numerous dates is based upon an examination of the records and data of the defendant obtained by me by consulting the originals, and the records constituting such data are numerous and voluminous. My knowledge is derived from an inspection of the records of the defendant.

The records and data of the defendant were not furnished to me but were inspected and examined by me. They are both numerous and voluminous. I can not attach and identify the originals as they are in the possession of the defendant. It is not true that the result of providing for current death losses could have been accomplished by a proportionate or graduated raise in assessments against the mem-

bers of the other classes, for the members of the fifth class at the time were paying an adequate rate, and the only effect of the re-rating in August 1910 was to compel the members of the fourth class to pay the same rates as members in the fifth class at the corresponding ages were paying.

It is true that as a result of the rerating adopted by the Supreme Lodge in August 1910 the assessments against members of the fourth class were raised to their attained ages at the time that such rerating went into effect, not "as attained at the date of each assessment." The members of the fifth class had been treated in the same way, viz: they were rated as of the age when they started to pay the adequate rate, and lest there be any misunderstanding about the matter, I desire to repeat that the rerating of the fourth class does not anticipate any increase in the assessments to be paid in the future.

248 For the reason before given, I cannot state the number of members in each class. The aggregate amount of insurance, the average age of the membership in each class and the average amount of assessments received from each class, can be ascertained from the records of the defendant. This (ninth) cross-interrogatory is answered fully by my answer to interrogatory 11. I cannot attach copies of the records for the reasons before given.

It is not a fact that I was consulted by the defendant or any of its departments for the purpose of securing my aid for raising the rates of assessments in the fourth class. I was retained for the purpose of ascertaining the condition of the various classes of the insurance department, Knights of Pythias, and making such recommendations as were necessary to perpetrate the same and render the insurance absolutely secure and safe.

It is not true that under the rerating outlined by me and actually adopted by the Supreme Lodge in August 1910 the member must have either paid the increased assessment or joined the fifth class. There were numerous options offered to him, some of which contemplated the payment by him of the same rate of assessment which he had been paying.

I intended by my answer to direct interrogatory 14 to show that every fraternal association, which was compelled to rerate had one thing identical with the condition surrounding defendant, viz: that they were attempting to furnish insurance below cost, and that the charging of inadequate rates could only result in failure.

249 I cannot state whether any fraternal beneficiary association or old line insurance company would have issued a policy to S. Mims at the age which he was on February 1st 1911. It is a fact known to me that the defendant has offered to issue a policy of insurance to said plaintiff without medical examination. It is not usual among insurance companies to accept as a new or original risk an applicant above the age of 70, but whether such an applicant would be refused, is a matter of which I have no knowledge.

Counsel for the defendant introduced in evidence the following from general laws and constitution for the Government of sections of

the endowment rank adopted by the Supreme Lodge Knights of Pythias, August 1880:

Article V.

SECTION 5. The power to adopt any additional forms, change, alter or amend any of the secret work, laws, or the business details connected therewith, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank in detail and require of all the Sections a strict conformity therewith.

Article VI.

SECTION 4. These laws may be altered or amended at any regular session of the Supreme Lodge K. of P.

Article 4.

SECTION 1. A member may at any time withdraw from membership in this Rank, or either class thereof, provided there are
250 no financial or other charges against him. Such withdrawal shall cause the entire forfeiture of all amounts paid into and all claims upon the funds of the Endowment Rank, belonging to the class or classes from which said withdrawal is made.

SECTION 2. When a member of this Rank voluntarily withdraws from the Knight's Rank in his Lodge, or is suspended therefrom for non-payment of dues, or whenever his membership therein ceases from any cause, he thereby severs his connection with this Rank, and forfeits all his rights, title and interest in and to the endowment fund, and all amounts he may have contributed thereto.

Counsel for the defendant introduced in evidence the following from general laws and constitution for the government of sections of the endowment rank adopted by the Supreme Lodge of Knights of Pythias, April 30, 1884.

Article 1.

Powers of the Supreme Lodge.

SECTION 1. It possesses the power, in accordance with the laws of the order, to establish the Endowment Rank.

SECTION 6. To create, hold and disburse the funds named in the objects of the Rank, under such regulations as it may deem necessary to adopt.

Article IV.

SECTION 5. The power to adopt any additional forms, alter or amend any of the laws or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and
251 it shall be the duty of that body to preserve uniformity in workings of the Rank in detail, and to require on the part of all sections a strict conformity therewith.

Article V.

SECTION 4. If after paying a benefit, there remain in the fund belonging to the Class of which the deceased was a member, a less sum than is sufficient to pay a benefit in that class, the Supreme Secretary shall immediately notify the Secretary of each Section to collect and forward to him an assessment of \$1.10 from each member of said Class, which must be paid within thirty days.

Article VII.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge Knights of Pythias, by a two thirds vote.

Article V.

Graded Class.

SECTION 1. In addition to the three classes specified in Section 2 of Article IV of this Constitution, there shall be a class of endowment designated as the fourth class. In said class the benefit to be obtained may be one thousand dollars, two thousand or three thousand, at the option of the applicant.

SECTION 3. Members of one or more of the other classes shall, upon application, which must be made within one year from the date of promulgation of this constitution, and upon the surrender of their certificates, be entitled to a transfer of their membership to the fourth class, without the payment of any fee, and without passing a new medical examination, except in case where the endowment is increased and shall be graded of their age at the time of original entry into the Endowment Rank, (the class corresponding to the amount of their endowment in the fourth class).

SECTION 6. Until one monthly payment by members holding an equal amount of endowment, less the amount placed in reserve, shall be sufficient to pay the amount of endowment held by a brother, the benefit to be paid in case of death shall be a sum equal to one payment by each member holding an equal amount of endowment less the amount to be placed in reserve.

SECTION 10. All the laws, forms and business details of the Endowment Rank, heretofore made or hereafter enacted, shall apply with full force to the Fourth Class and the members thereof, so far as they are applicable thereto and so far as they are not changed by the provisions of this article.

Article VIII.

Assessments and Penalties.

SECTION 1. Upon receiving notice of an assessment, each member shall at once pay the amount to the secretary of the Section to which he belongs, if any neglect, for thirty days after date of notice, to pay,

said assessment, he shall stand suspended from the class of the Endowment Rank, for which said assessment was made, and shall forfeit all claims upon the endowment fund belonging to that class.

SECTION 2. Monthly payments by members holding certificates of endowment in the fourth class, shall be due and payable without notice on the first day of each and every month; and a failure to make such payment on or before the tenth day of the month shall subject a member so failing to the penalty and forfeiture prescribed in the preceding Section.

Article XV.

Amendments.

The provisions of this constitution may be altered or amended at any regular session of the Supreme Lodge by two-thirds vote.

Counsel for the defendant introduced in evidence the Constitution and general laws of the endowment rank of Pythias of the World, adopted at the fourteenth session of the Supreme Lodge, held at Toronto, Ont., July 13th to 23rd, inclusive, 1886, the following:

Article I.

Powers of the Supreme Lodge.

SECTION 1. It possesses the power, in accordance with the laws of the order, to establish the Endowment Rank.

SECTION 6. To create and disburse the funds of the endowment rank, under such regulations as it may deem necessary.

Article II.

SECTION 1. Each applicant after entering his name upon the petition must make a regular application and be examined in accordance with the public "Rules for Medical Examiners," by a physician selected by the petitioners who shall prepare and sign the certificate attached to the application; said application and medical examiners

shall be of the form furnished by the Supreme Secretary, which shall contain the following declaration and agreement, to be subscribed to by the applicant.

Declaration and Agreement.

I declare that I am not now a member of the Endowment Rank, have not been rejected within the past six months.

I hereby agree that I will punctually pay all dues and assessments, for which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force or that may hereafter be enacted, or submit to the penalties therein contained.

Certificate of Membership.

Endowment Rank of the Order of Knights of Pythias of the World.

This certifies that brother ——— received the Endowment Rank of the Order of Knights of Pythias in suction number — on ——— 188— and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application, bearing date ——— 188— which application is made a part of this contract, and the payment — the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing the Rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of — dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to ——— as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon the notice and proof of death, and good standing in the Rank at the time of death, and surrender of this certificate.

Provided, however, that if, at the time of the death of said brother, one monthly payment to the Endowment Fund by members holding an equal amount of Endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding an equal amount of endowment. And it is understood and agreed, that any violation of the within mentioned conditions or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

SEC. 5. The power to adopt any additional forms, alter or amend any of the laws or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank in detail, and to require on the part of the Sections a strict conformity therewith.

Article V.

SEC. 5. The power to adopt any additional forms, alter or amend any of the laws or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the rank in detail, and to require of the part of all Sections a strict conformity therewith.

Article VI.

SEC. 1. The funds of the Endowment Rank shall be as follows:
The endowment Fund, which shall be derived from all the

monthly assessments and from the special assessments when necessary.

SEC. 3. Assessments may be ordered by the board of control whenever required by the necessities of the endowment rank.

Article XI.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge of Knights of Pythias of the World, by a two-thirds vote.

Article XII.

Amendments.

The provisions of these general laws may be altered or amended at any regular session of the Supreme Lodge Knights of Pythias of the World by a two-thirds vote.

Counsel for the defendant offered in evidence the following portions from the Constitution of the Endowment Rank Knights of Pythias of the World, also, General Laws and regulations adopted by the Board of Control, July 1888:

Article I.

Powers of the Supreme Lodge.

SEC. 1. It possesses the power, in accordance with the laws of the order, to establish the endowment rank.

SEC. 6. To create, hold and disburse through a Board of Control, the funds of the Endowment Rank, under such regulations as it may deem necessary.

Each applicant after entering his name upon the petition must make a regular application upon a form provided for by the Board of Control, and be examined in accordance with the published "Rules for Medical Examinations," by a physician selected by the Board of Control of the Endowment Rank, who shall prepare and sign the certificate attached to the application; said application and medical examiner's certificate shall be of the form furnished by the Board of Control of the Endowment Rank, which shall contain the following declaration and agreement, to be subscribed to by the applicant:

I declare that I am — now a member of the Endowment Rank, Knights of Pythias, and have not been rejected as an applicant thereof. I declare, furthermore, that all of the above statements are true to the best of my knowledge and belief, and that I have not concealed or omitted to state anything regarding my health, past or present, affecting the expectancy of my life; and that I hereby consent and agree that any untrue statements made in this application, or to the Medical Examiner or any concealment of the facts touching my health or expectancy of life, or for failure of neglect to pay any or all assessments and dues as prescribed by the laws of the

rank or order, or for other causes, or voluntarily severing my connection with the Order, shall work a forfeiture to all my rights of my heirs and beneficiaries, to all benefits and privileges accruing to members of this Rank.

258 I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, or submit to the penalties therein contained, to all of which I willingly and freely subscribe.

Article III.

SEC. 5. The Supreme Lodge through the Board of Control of the Endowment Rank, shall issue, or cause to be issued, to all members of the rank who are entitled thereto, a certificate of membership in substance as follows:

No. —.

\$—.

Fourth Class.

Certificate of Membership, Endowment Rank of the Order of Knights of Pythias of the World.

This certifies that Brother ——— received the obligation of the Endowment Rank of the Order of Knights of Pythias of the World, in Section No. — on ———, 188—, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application, bearing date ———, 188—? which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all assessments and dues as required, and the full compliance with all the laws governing this Rank now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the World, and shall
259 be in good standing under said laws, the sum of — dollars will be paid by the Board of Control of the Endowment Rank, Knights of Pythias of the World, to ———: as directed by said Brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of Death, and surrender of this certificate.

Provided, however, that — at the time of the death of said brother, the proceeds of the assessment on all the members of the Endowment Rank shall not be sufficient to pay in full the maximum amount of endowment held under the certificate, then there shall be paid an amount, less ten per cent, for expense, equal to the proceeds of one full assessment on all remaining members of the Endowment Rank, and the payment of such sum to the beneficiary or beneficiaries men-

tioned herein, shall be in full of the claims and demands under any by virtue of this certificate.

Issued this — day of —, 188—, P. P. at —, and registered in Book —, Folio —.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

President Board of Control, Endowment Rank.

Attest:

Supreme Secretary.

260 I hereby accept this certificate of membership subject to all the conditions herein contained.

[SEAL.]

Secretary of Section No. —.

Article IV.

Monthly Assessments and Forfeiture of Certificate of Endowment.

SEC. 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the Secretary of the Section in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank; unless otherwise provided for by the Supreme Lodge Knights of Pythias of the World.

Table of Monthly Payments.

Age.	\$1,000 amount.	\$2,000 amount.	\$3,000 amount.
21.....	\$.70	\$1.40	\$2.10
22.....	.70	1.40	2.10
23.....	.70	1.40	2.10
24.....	.70	1.40	2.10
25.....	.75	1.50	2.25
26.....	.75	1.50	2.25
27.....	.80	1.60	2.40
28.....	.80	1.60	2.40
29.....	.80	1.60	2.40
30.....	.80	1.60	2.40
31.....	.85	1.70	2.55
32.....	.90	1.80	2.70
33.....	.90	1.80	2.70
34.....	.95	1.90	2.85
35.....	.95	1.90	2.85
36.....	1.00	2.00	3.00

37.....	1.00	2.00	3.00
38.....	1.05	2.10	3.15
39.....	1.10	2.20	3.15
40.....	1.10	2.20	3.30
41.....	1.15	2.30	3.45
42.....	1.20	2.40	3.60
43.....	1.25	2.50	3.75
44.....	1.30	2.60	3.90
45.....	1.35	2.70	4.05
46.....	1.40	2.80	4.20
47.....	1.45	2.90	4.35
48.....	1.50	3.00	4.50
49.....	1.55	3.10	4.65
50.....	1.60	3.20	4.80

261 SEC. 2. If at the time of the death of a member of the Endowment Rank, the proceeds of one assessment upon all members of said rank, shall not be sufficient to pay in full the maximum amount of endowment held under the certificate of said deceased member, then there shall be paid to the beneficiary an amount equal to the proceeds of one full assessment made upon all the remaining members of the said Endowment Rank, less ten per cent, for expenses, and the payment of such sum to the beneficiary, shall be in full of all claims and demands under any by virtue of said certificate.

Article VI.

SEC. 1. The funds of the Endowment Rank shall be placed to the credit of the Endowment Rank, which shall be derived from all assessments; from the membership fees; certificate fees; clearance card fees, from the sale of supplies and from all other sources of revenue.

SEC. 3. Special assessments may be made upon all members of the Endowment Rank, by the Board of Control, when necessary to meet the liabilities of the Rank.

Article VII.

SEC. 5. The Board shall have entire charge and full control of the Endowment Rank, subject to such restrictions as the Supreme Lodge may, from time to time, provide.

SEC. 9. The Board is hereby authorized to enact general laws, rules and regulations in conformity with this Constitution for the government of Sections and the membership of the endowment rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.

262 SEC. 17. The Board are hereby empowered and directed to re-rate the members transferred from the first, second and third classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third

classes. The Board is instructed to re-rate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said re-rating to take effect at such date as the Board shall prescribe on and after the 1st day of August, 1888; and the board is further empowered to re-rate the present tables of the fourth class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the rank.

Article XV.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge Knights of Pythias of the World, by a two-thirds vote.

The defendant offered in evidence Article Ten of The General Law, Rules and Regulations for the government of Sections of the Endowment Rank Knights of Pythias of the World, adopted by the Board of Control of the Endowment Rank Knights of Pythias of the World, July 1888, under the head of "Amendments."

263 The provisions of these general laws may be altered or amended at any regular session of the Supreme Lodge of the Endowment Rank, Knights of Pythias of the World.

The 16th Session of the Supreme Lodge held at Cincinnati June 12th, to 23rd, inclusive, in the year 1890 made no change, whatever in the Constitution of the Endowment Rank, and the Board of Control at its meeting October 24th, in the same year, made no change in the rules, but adopted the old rules.

There was no change made in the Constitution and by-laws of the Endowment Rank either by the Supreme Lodge at the Biennial Convention in 1892 or by the Board of Control at the meeting subsequent thereto.

The defendant offered in evidence the following amendments, which were adopted at the Biennial Convention of the Supreme Lodge, 1894:

Article IV.

Monthly payments, dues, classification or Risks, Forfeiture of certificates, etc.

Sec. 1. Each applicant for membership in the endowment rank shall, upon completion of his application for transmission to the Board of Control, pay to the Secretary of the Section, in accordance with his age and the amount of the endowment applied for, a monthly payment as provided in the following table, and if accepted, such member shall continue to pay the same amount each month thereafter as long as he remains a member of the endow-

ment rank, unless otherwise provided for by the Supreme Lodge
or Board of Control of the endowment rank, Knights of
264 Pythias of the World.

Table of Monthly Payments:

Age.	\$1,000 Amount.	\$2,000 Amount.	\$3,000 Amount.
21.....	\$.70	\$1.40	\$2.10
22.....	.70	1.40	2.10
23.....	.70	1.40	2.10
24.....	.70	1.40	2.10
25.....	.75	1.50	2.25
26.....	.75	1.50	2.25
27.....	.80	1.60	2.40
28.....	.80	1.60	2.40
29.....	.80	1.60	2.40
30.....	.80	1.60	2.40
31.....	.85	1.70	2.55
32.....	.90	1.80	2.70
33.....	.90	1.80	2.70
34.....	.95	1.90	2.85
35.....	.95	1.90	2.85
36.....	1.00	2.00	3.00
37.....	1.00	2.00	3.00
38.....	1.05	2.10	3.15
39.....	1.10	2.20	3.30
40.....	1.10	2.20	3.30
41.....	1.15	2.30	3.45
42.....	1.20	2.40	3.60
43.....	1.25	2.50	3.75
44.....	1.30	2.60	3.90
45.....	1.35	2.70	4.05
46.....	1.40	2.80	4.20
47.....	1.45	2.90	4.35
48.....	1.50	3.00	4.50
49.....	1.55	3.10	4.65
50.....	1.60	3.20	4.80

The defendant offered in evidence Section No. 4 of the Amendments adopted at the Biennial Session of the Supreme Lodge, July 11, 1901, as follows:

SEC. 4. Each applicant for membership in the endowment rank shall, upon completion of his application for transmission to the Board of Control, pay to the Secretary of the Section, in accordance with his age, occupation and the amount of endowment applied for, a monthly payment as provided herein, and as provided in Section 5 of this Article; and if accepted, such member shall continue to pay the same amount each month thereafter as long as he remains

265 a member of the endowment rank, except as provided in Section 6 of this Article or unless otherwise provided for by enactments of the Supreme Lodge or Board of Control of the Endowment Rank Knights of Pythias; and every person who is at present a member of the Endowment Rank shall pay each month hereafter, as long as he remains a member of the endowment rank, monthly payments as fixed by the table herein in accordance with the age at which he has been immediately heretofore rated and in accordance with the amount of his endowment and in accordance with his occupation as provided in Section No. 5 of this Article, so long as he shall remain a member of the Endowment Rank, except as provided in Section 6 of this Article or unless otherwise provided by enactment of the Supreme Lodge, or Board of Control of the Endowment Rank Knights of Pythias.

Members having \$4,000.00 or \$5,000.00 endowments shall pay four or five times, respectively, the rates for \$1,000.00 endowments, according to the table herein.

First Change to Present Rates.

Table of Monthly Payments.

Age.	\$500 Amount.	\$1,000 Amount.	\$2,000 Amount.	\$3,000 Amount.
21.....	\$.45	\$.90	\$1.80	\$2.70
22.....	.50	.95	1.90	2.85
23.....	.50	1.00	2.00	3.00
24.....	.50	1.05	2.00	3.00
25.....	.55	1.05	2.10	3.15
26.....	.55	1.10	2.20	3.30
27.....	.55	1.10	2.20	3.30
28.....	.60	1.15	2.30	3.45
29.....	.60	1.20	2.40	3.60
30.....	.65	1.25	2.50	3.75
31.....	.65	1.25	2.50	3.75
32.....	.65	1.30	2.60	3.90
33.....	.70	1.35	2.70	4.05
34.....	.70	1.40	2.80	4.20
35.....	.75	1.45	2.90	4.35
36.....	.75	1.50	3.00	4.50
37.....	.80	1.60	3.20	4.80
266				
38.....	.85	1.65	3.30	4.95
39.....	.85	1.70	3.40	5.10
40.....	.90	1.75	3.50	5.25
41.....	.90	1.85	3.70	5.55
42.....	.95	1.90	3.80	5.70
43.....	1.00	2.00	4.00	6.00

44.....	1.05	2.10	4.20	6.30
45.....	1.10	2.15	4.30	6.45
46.....	1.15	2.25	4.50	6.75
47.....	1.20	2.35	4.70	7.05
48.....	1.25	2.45	4.95	7.35
49.....	1.30	2.60	5.20	7.80
50.....	1.35	2.70	5.40	8.10

That the amounts received under said table shall be divided into separate and distinct funds, to be known as the mortuary fund and expense fund; that 90 per cent of the receipts from assessments under said table shall be paid into, and be known as a mortuary fund, and shall be used exclusively in the payment of claims incurred under certificates of membership, whether by death or otherwise, and 10 per cent of the receipts from assessments under said table shall be paid into and shall be the expense fund, to be used in the payment of items of expense, and the liquidation of all claims against the endowment rank other than those provided for above, provided, that at any time when in the judgment of the Board of Control the condition of the finances of the endowment rank will permit the Board of Control is authorized and directed to suspend the collection of monthly payments. This amendment shall take effect and be in force from and after August 31, 1901.

SECTION No. 14. Any surplus that may be realized from any source of the endowment rank shall be applicable only to the payment of mortuary claims or the expense of the endowment rank, nor shall any member of the endowment rank have any claim, whatever, to any part of said surplus during his lifetime, or
 267 have any portion of said surplus apply to the maintenance of his certificate in case of his failure to pay his regular monthly assessments or any special assessments that may be levied by the Board of Control; and the Board of Control is hereby instructed to incorporate this Section of this Article into all future certificates of insurance.

W. O. POWERS, a witness for the defendant, first being duly sworn, testified as follows:

My name is W. O. Powers, and I reside in Indianapolis Indiana. I am the general secretary of the Knights of Pythias Insurance Organization. I have been connected with them since June 1903. I have recently made an examination of the records of the Knights of Pythias Organization in the office where these records are kept. That examination extended to the laws of the Knights of Pythias.

(Witness was handed a book.)

This books is the result of my work. I examined the original record, of which this purports to be printed copies. This book contains a correct copy of the records in the home office where the records are kept, and these pamphlets are true and correct copies of the originals on file. The originals are kept in the office of the

Supreme Keeper of Records and Seal of the order at Minneapolis, Minn. I have not the records here but I propose to testify from the knowledge I obtained from the inspection of the records. I am the Keeper of the Records of the financial department of the insurance department of the Knights of Pythias.

268 Mr. Wheaton is called the Supreme Keeper of Records and

Seal and he is in Minneapolis, Minn., but I am the keeper of the records of the insurance department. The original of these records here that are bundled up are in the custody of Mr. Wheaton at Minneapolis. Mr. Wheaton is the Supreme Keeper of Records and Seal of the Order, the insurance department, of which I am secretary, and I am the custodian of all the books and records pertaining to the insurance department. Mr. Wheaton has nothing to do with the matters concerning the insurance department, but simply the order itself. He does not keep any of the accounts of the insurance department, nor does he keep any of the books showing the financial condition of the insurance department.

Any laws that were passed by the old defunct order, the originals of those are in Mr. Wheaton's possession. I am not the custodian of those originals. Mr. Wheaton is the Supreme Keeper of the Records and Seal, and has in his possession and charge all of the books and manuscripts of the Order from the beginning down to now. I only keep the matters concerning the insurance department. I have the records of the financial affairs at my office in Indianapolis, Ind. I have none of them here, but I have in my mind what the condition is. The Knights of Pythias Organization extends over the various states of the Union, in Canada and in China and practically all over the world, and the by-laws of the order relate to the entire country. These records are voluminous. There is a journal for each session from 1870 down to date. They have biennial sessions. The laws are kept in the journals with other matters.

269 I could not pick the journals to pieces and bring just the laws. These are the laws governing the insurance department, but *does* not comprise all of the laws. Judge Brown has a certified copy of the laws.

On August 31st, 1910 there were in the fourth class 11,322 carrying insurance to the extent of \$21,529,000.00, and the gross mortuary fund on hand on that date, which does not take into consideration the unpaid death losses on that date, was \$675,800.85. Assuming that the certificates were all filed; by that I mean the same amount of per capita interest of each member in that fund would, on that date be \$31.39. In the case of the plaintiff, Mr. Mims, he held a \$3,000.00 certificate, which would make his equity in the fund on that date \$94.17. On the first day of January, 1911, there were 8,784 carrying insurance to the extent of \$16,996,500.00, and the gross mortuary fund on hand on that date was \$541,766.98, and the equity of Mr. Mims on that date would be \$95.61.

Cross-examination:

Quite a number of members transferred from the fourth class to the fifth class when the fifth class was created. There were about

55,000 members went from the fourth class to the fifth class carrying insurance of about eighty million dollars. None of the members who transferred from the fourth class into the fifth class carried with them into the fifth class the moneys that they had theretofore contributed to the fourth class fund. The mortuary fund of the fourth class remained to the credit of the members who remained in the fourth class. The fifth class has not one dollar of surplus except what was earned on last year's accounting, and which is being apportioned among the members this year. This is a vast difference between surplus and reserve. The fifth class has something like three million dollars reserve fund. I am thirty eight years old.

Redirect examination :

That three million dollar fund was created through the contributions of those members, who were members of the fifth class. The rates paid by the fifth class members are based on the American Experience Table of Mortality with an interest assumption of three and one half per cent. Those rates exceed the rates of the same members in the fourth class, the members who transferred from the fourth class to the fifth class left their share of the mortuary fund to the benefit of the fourth class. The fifth class fund was created by the contributions of the members in that class only. The members of the fourth class contributed nothing to that fund. The members of the fifth class participated in no way in the mortuary fund of the fourth class. This three million dollar fund in the fifth class has to be used and is required to be on hand at all times as a sufficient fund together with the future payments to be made by the members of the fifth class, and the interest to be earned in order to have a sufficient fund on hand to mature the contracts of the fifth class. It is not more than sufficient for that purpose.

The plaintiff in this case never contributed one cent to that fund. None of the funds of the unincorporated society went into this new corporation. The new corporation was formed in 1894. None of the funds of the unincorporated concern went into the present order. When this corporation was formed in 1894 I was not with the concern, and all that I know is by the records. I was not with the concern until 1903. I was born in 1874, and when the present corporation was formed there was nothing to take over from the unincorporated concern. They took over its books and assumed the liabilities of the unincorporated society, but there was no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did take over the affairs of the unincorporated Knights of Pythias. A large portion of the fifth class was made up from members who transferred from the fourth class. During the four years from 1890 to the promotion of the present corporation in 1894 I cannot state whether the un-

incorporated concern received regular monthly assessments on Mr. Mims' policy or not. That is, I do not know from my own knowledge, but according to the books it did receive monthly payments or assessments from the plaintiff constantly during said time. I assume that the plaintiff, Mr. Mims, has paid all dues and assessments required under the certificate. The record shows that he paid during those four years assessments to the unincorporated society.

W. O. POWERS, a witness for the defendant, being recalled, testified as follows:

The copies that I attached to my deposition of the laws of the Knights of Pythias were taken from these books that were offered in evidence yesterday, which books I compared with the original records.

Defendant closes.

Counsel for the plaintiff offered in evidence from the laws of 1884, Article No. 5, Section No. 5, as follows:

"The endowment fund for the payment of benefits in the fourth class shall be derived from monthly payments by each member, said payments to be for each one thousand dollars of endowment and to be graded according to the age of the member at the time of making application, except as provided in Section No. 3 of this Article, and his expectancy of life, the age to be taken at the nearest anniversary of his birthday. So much of such monthly payments — shall equal the actual cost of the endowment shall constitute the endowment fund and the residue of such monthly payments, shall be placed in a reserve fund. Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues. The said monthly payments for endowment and reserve shall be according to the following table:

Age at admission.	Cost or amount to endowment fund.	Amount to reserve.	Total monthly payments for each \$1,000.
21.....	\$.40	\$.30	\$.70
22.....	.40	.30	.70
23.....	.40	.30	.70
24.....	.40	.30	.70
25.....	.40	.30	.70
26.....	.40	.35	.75
27.....	.40	.40	.80
28.....	.40	.40	.80
29.....	.40	.40	.80
30.....	.40	.40	.80
273			
31.....	.45	.40	.85
32.....	.45	.45	.90

33.....	.45	.45	.90
34.....	.45	.50	.95
35.....	.45	.50	.95
36.....	.45	.55	1.00
37.....	.45	.55	1.00
38.....	.50	.55	1.05
39.....	.50	.60	1.10
40.....	.50	.60	1.10
41.....	.50	.65	1.15
42.....	.50	.70	1.20
43.....	.55	.70	1.25
44.....	.55	.75	1.30
45.....	.60	.75	1.35
46.....	.60	.80	1.40
47.....	.60	.85	1.45
48.....	.65	.85	1.50
49.....	.70	.85	1.55
50.....	.70	.90	1.60
51.....	.75	.90	1.65
52.....	.80	.95	1.75
53.....	.85	.95	1.80
54.....	.90	1.00	1.90
55.....	.95	1.05	2.00
56.....	1.00	1.10	2.10
57.....	1.10	1.10	2.20
58.....	1.15	1.15	2.30
59.....	1.25	1.15	2.40
60.....	1.35	1.20	2.55

Counsel for the plaintiff offered in evidence the following portions of the deposition of W. O. Powers; giving the data as indicated below as to the number of remaining insured member- of age 74 and up and aggregated insurance of such on August 31, 1910:

Attained age.	No.	Amount.
74.....	125	\$286,000
75.....	112	253,000
76.....	96	218,000
77.....	97	210,000
78.....	67	145,000
79.....	64	137,000
80.....	40	85,000
81.....	25	53,000
82.....	14	23,000
83.....	9	15,000
84.....	3	5,000
85.....	5	10,000
86.....	0	00,000
87.....	2	2,000

274 Counsel for plaintiff introduced the following additional from the deposition of W. O. Powers:

"Assuming the nearest birthday of S. Mims on January 1, 1911 to be 74 years, there were 95 members at that age carrying insurance to the extent of \$220,000.00."

Plaintiff introduced the question and answer as follows to the deposition of W. O. Powers: Q. "Give the name of any fraternal beneficiary association which would have re-insured plaintiff on February 1, 1911 at his then age, he being 73 on June 6, 1910." A. "I do not know of a fraternal society writing insurance beyond age 60."

Plaintiff introduced the following from W. O. Powers' deposition:

"Number of members in fourth class 8-31-1910, 11,322.

Amount of insurance fourth class 8-31, 1910, \$21,529,000.00.

Average age—55.77 years.

Number of members in fifth class August 31, 1910, 62,379.

Amount of insurance in fifth class August 31, 1910, \$88,557,-134.00.

Average age—41.62 years."

Plaintiff introduced the following from W. O. Powers' deposition:—

"Rec'd from all sources 4th Cl., 1-1-10 to 8-1-10.....388,140.97

Paid out in Losses 4th Cl. 1-1-10 to 8-1-10.....583,255.96

Short195,114.99

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Rec'd from all sources 5th Cl., 1-1-10 to 8-1-10.....\$1,043,429.59

Paid out in death losses, etc., 5th Cl., 1-1-10 to 8-1-10 616,069.85

Balance 427,359.74

Net balance 1-1-10 to 8-1-10..... 232,244.75."

Plaintiff introduced the following from W. O. Powers' deposition:

"There is no separate chartered department for the insurance department. It does not exist as a separate institution, but as a part and parcel of the Supreme Lodge; whatever business it transacts is done under the supervision of the Supreme Lodge."

Plaintiff introduced the following from W. O. Powers' deposition:

"For the month of July, 1910 there was received from members in the Fourth Class \$56,812.38. This was made up of one regular monthly assessment and one special assessment equal to one regular.

Death losses for July 1910 in Fourth Class were \$78,912.10. In the Fifth Class for the same month assessments paid in from

Fifth Class members were.....\$147,549.61

Death losses were..... 95,000.00

Total receipts for July, 1910, both classes.....\$204,361.99

Death losses for July, 1910, both classes..... 173,912.10

The balance to the credit of the Fourth Class Mortuary Fund on July 31st, 1910 was \$700,930.36.

The balance to the credit of the Fifth Class Mortuary Fund on July 31st, 1910 was \$2,101,108.18."

276 Counsel for the defendant offered in evidence the following from the deposition of S. H. Wolfe:

"The adjustment has worked admirably, for each year since 1907 two monthly assessments have forborne, with the exception of 1909, when the mortality experienced justified the waiving of only one assessment.

"I have no hesitancy in stating that if the Fifth Class had not been established, the Fourth Class would have been unable to keep up as long as it has done."

It is agreed by and between counsel for the plaintiff and the defendant respectively that the charter of the old corporation expired on the 5th day of August, 1890, and that the new incorporated society was incorporated on the 29th day of June, 1894, and that between said dates an unincorporated society known as the Supreme Lodge, Knights of Pythias, or Supreme Lodge, Knights of Pythias of the World carried on business under the laws existing in 1890 and subsequently adopted by it.

I, T. C. Eades, Court Reporter, who reported the above styled and numbered cause do hereby certify that the foregoing one hundred and eighteen pages constitute a complete and correct statement of all the facts proven on the trial thereof, and that I reported the said cause and reduced all the testimony in narrative form on request of defendant's counsel; and that this is original copy of said statement of facts.

T. C. EADES,
Official Court Reporter.

277 The parties to the above styled cause having failed to agree upon a statement of facts, and having submitted their respective statements to me, have of my own knowledge with the aid of their statements made out and signed the foregoing statement, which I hereby certify to be a complete and correct statement of all the facts proven on the trial of the above styled and numbered cause, and the Clerk is hereby directed to file same as the original statement of facts in said cause.

E. B. MUSE,
District Judge.

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No. 6997.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
 vs.
 S. MIMS, Appellee.

Appeal from the District Court of Dallas County.

Opinion.

Appellee brought this suit against the appellant, May 19th, 1911, to recover damages for the breach of a benefit certificate, or contract of insurance, issued to the appellee on the 29th day of May, 1885, by a corporation known as the Supreme Lodge, Knights of Pythias of the World. From a judgment in favor of plaintiff the defendant appealed.

The material facts are substantially as follows: On or about August 5th, 1870, a fraternal beneficiary association designated the Supreme Lodge Knights of Pythias of the World, was incorporated under and by virtue of an Act of Congress of the United States, approved May 5th, 1870. By the terms of the Act of incorporation of said fraternal association, the charter thereof expired on or about the 5th day of August, 1890. The defendant in this case, the Supreme Lodge, Knights of Pythias, was incorporated by an Act of Congress of the United States, approved by the President June 29th, 1894, and since said date the appellant continued to act under and by virtue of said original act of incorporation and the amendments thereto, up to the date of this suit, and since said time. Between the date of the expiration of the charter of the old corporation known as the Supreme Lodge, Knights of Pythias of the World, which charter expired, as above stated, on the 5th day of August, 1890, and the date of the incorporation

279 incorporated society, known as the Supreme Lodge, Knights of Pythias, or Supreme Lodge, Knights of Pythias of the World, carried on business under the laws existing in 1890. On April 11, 1879, appellee made his application to the endowment rank of the old corporation referred to, chartered in 1870, for certificates of insurance in what was known as the first and second class of said endowment rank, and said application contained the following stipulation: "I hereby agree to conform to and obey the laws, rules and regulations of the order governing this rank now in force, or that may hereafter be enacted, or submit to the penalties therein contained."

Upon said application two contracts of insurance, or benefit certificates, one for the sum of one thousand dollars, and the other for the sum of two thousand dollars, to be paid to plaintiff's wife upon notice and proof of his death and good standing in the rank at the time of his death, were issued to plaintiff on the 30th. day of April, 1879. The application upon which these certificates were issued was made a part thereof and the respective

amounts therein agreed to be paid, were payable upon condition that the plaintiff paid all assessments to the endowment rank as required and a full compliance with all the laws governing said rank "now in force, or that may hereafter be enacted." Each of these certificates also contained the following: "And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing the rank, shall render this certificate and all claims null and void, and that

the said Supreme Lodge shall not be liable for the above
280 sum, or any part thereof." On May 7th, 1885, plaintiff

made application to be transferred to what was known as the fourth class of the endowment rank of the corporation, chartered in 1870, and surrendered all his right, title and interest in and to the two certificates mentioned. There was then issued to plaintiff, on the 29th. day of May, 1885, a benefit certificate, wherein, "in consideration of the representations and declarations made in his application bearing date of April 11th, 1879, and his absolute surrender of the certificates heretofore held by him in 1st. and 2nd. classes for cancellation as requested in his application for transfer to the fourth class bearing date of May 7th, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted and shall be in good standing under said laws the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Mary J. Mims, wife, as directed, etc." This certificate, like the two first issued, contained the following clause: "And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof." The two certificates issued to plaintiff in 1879, were issued upon what is known as the "post-

mortem plan," by which upon death of a member in one of
281 said classes an assessment was levied upon the remaining members, and out of the proceeds of such assessment the certificate issued was paid. Article 5, Section 1 of the laws passed in 1884, by the corporation chartered in 1870, provides: "In addition to the three classes specified in Section 2 of Article 4 of this constitution, there shall be a class endowment designated as the fourth class. In said class the benefit to be obtained, may be one thousand dollars, two thousand dollars or three thousand dollars, at the option of the applicant." Section 4 provides: "The endowment fund for the payment of benefits in the fourth class shall be derived from monthly payments by each member, said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to be taken at the nearest anniversary of his birthday. So much of the monthly payments as shall equal the actual cost of the endowment shall constitute

the endowment fund, and the residue of such monthly payments shall be placed in the reserve fund. Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues. The said monthly payment for endowment and reserve shall be according to the following table: Then follows a table of rates varying from ages 21 to 60, inclusive, in which was "age at admission, 42. Cost or amount of endowment fund, 50c. Amount of reserve, 70c. Table monthly payments for each one thousand dollars, \$1.20."

282 The plaintiff, at the date of his application in April, 1879, was forty two years old. Section 5 is: "Until one monthly payment by members holding an equal amount of endowment, less the amount placed in reserve, shall be sufficient to pay the amount of endowment held by a brother, the benefit to be paid in case of death shall be a sum equal to one payment by each member holding an equal amount of endowment, less the amount to be placed in reserve." Section 7 is: "The expenses of conducting the business of the fourth class shall be paid out of the reserve fund." Section 9 is: "All the laws, forms and business details of the endowment rank heretofore made and hereafter enacted shall apply with full force to the fourth class and the members thereof, so far as they are applicable thereto, and so far as they are not changed by the provisions of this Article." In the laws adopted in July, 1888, it is provided: "Each member of the endowment rank shall, on presenting himself for obligation, pay the Secretary of the Section, in accordance with his age, and the amount of endowment applied for, a monthly assessment as provided in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank, unless otherwise provided for by the Supreme Lodge Knights of Pythias of the World." Then follows a table of monthly payments provided for in said laws. Section 3 of said laws provides that special assessments may be made upon all members of the endowment rank by the board of control when necessary to meet the liabilities of the rank and Section 17 of said laws is as follows: "The board are hereby empowered and directed to re-rate the members transferred from the first, second and third classes under resolutions passed by

283 the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to re-rate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said re-rating to take effect at such date as the board shall prescribe on and after the 1st. day of August, 1888, and the board is further empowered to re-rate the present tables of the fourth class, applying it to all members should such action become necessary for the proper protection and perpetuity of the rank." In July, 1901, at its bi-annual session, the Supreme Lodge of the defendant passed a law that each applicant for membership in the endowment rank should upon completion of his application for transmission to the board of control pay the secretary of the section

in accordance with his age, occupation and the amount of endowment applied for a monthly payment as provided in Section 5, and that if accepted, such member should continue to pay the same amount each month thereafter as long as he remained a member of the endowment rank, except as provided in Section 6 of the Article, or unless otherwise provided for by enactment of the Supreme Lodge or board of control of the endowment rank, Knights of Pythias of the World." (Said Sections 5 and 6 do not appear in the record). The plaintiff, upon the expiration of the charter of the old corporation in 1890, paid to the unincorporated society above referred to from the year 1890, up to June, 1894, when defendant

284 herein was incorporated, the dues upon the certificate made the basis of this suit, according to the laws under which said

incorporated society was transacting business, and after the defendant was incorporated he paid to it dues and assessments required by it to be paid up to some time in 1910, but there seems to be no direct testimony that plaintiff knew of the unincorporated society or defendant, or had knowledge of the laws of either. The defendant was incorporated in 1894, as stated, by an Act of Congress of the United States, and then acquired and took over the membership, insurance business and all the assets of the said former corporation and unincorporated society. The rate plaintiff was required to pay when he went into the fourth class was \$3.60 per month, and in 1888 it was raised to \$4.50 per month, in 1904, to \$4.65 per month, and in 1901, to \$7.35 per month. These raises in the rates were paid by plaintiff, but he swears that he paid them under protest. In August, 1910, the defendant in convention assembled enacted a law declaring that every member of the fourth class on January 1st, 1911, should be re-rated according to his attained age and occupation, and the amount of benefit provided for in his certificate, unless the member should elect to take some one of certain options offered him, and plaintiff was notified that, if he did not elect to take one of said options and desired to continue the amount of his certificate, beginning with the month of January, 1911 and for each month thereafter, his monthly payment would be \$34.80. The law then passed also provided that "any member of the fourth class who shall fail to pay, when due, said monthly

285 payment, shall thereby ipso facto cease to be a member and his certificate, with all rights thereunder in said fourth class shall thereby terminate, subject to the provisions of the laws with reference to re-instatement. Plaintiff declined to accept either of the options tendered him, refused to pay the raised rates of \$34.80, and on January 20th, 1911, tendered the local secretary at Fort Worth, where his membership was, \$22.05 for the three months of January, February and March, 1911, at the old rate of \$7.35 per month, which tender was made in writing and declined. Plaintiff was then seventy-four years of age, and uninsurable, it seems, in any other fraternal order. It is provided in the laws passed in 1884, that, "these laws may be altered, or amended at any regular session of the Supreme Lodge Knights of Pythias by a two-thirds vote." The amended laws of 1910 contained the further provisions,

that the right to change, increase or adjust the schedules of rates in the fourth and fifth classes, respectively, or any of them, is expressly reserved to the Supreme Lodge, as is also the right to apply any such change, increase, or adjusted schedule of rates to all the members as of the date of their adoption, without regard to the date of any member's certificate. This right of adjustment includes the right to advance members without reference to the plan or class of which they are members to their attained age at any time, and apply the new rates applicable thereto when deemed necessary by the Supreme Lodge, to carry out the purposes of the insurance department; and further, that no member of the insurance department should have any divisible interest in the funds or properties

of the insurance department, and, except as provided for in
286 the laws with respect to the members of the fifth class, there should be no apportionment of any of said funds at any time.

etc. The defendant's charter granted in 1894, provides that, "all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in Section 1 of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time." The charter further provides, "that said corporation shall have a constitution and shall have power to amend the same at pleasure; provided that such constitutions or amendments thereof do not conflict with the laws of the United States or of any state." By an amendment thereto approved February 26th, 1907, it is provided that said corporation shall have the power to take and hold real and personal estate, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation."

The plaintiff charged, among other things, that the defendant, by the re-rating of the members and raising the dues and assessments required of plaintiff, breached its contract with plaintiff; and he prayed that he have judgment against the defendant for the amount of all dues, assessments or other sums paid to it, or any of its subsidiary lodges, with interest upon each such payment from its

287 respective date, or for the value of plaintiff's policy at the time of its breach, with interest thereon as allowed by law, for judgment directing the payment to plaintiff by defendant out of its endowment rank fund, or any other fund or funds, of defendant into which, upon trial, it may be shown the payments to defendants have been made, and for a lien upon said fund, with foreclosure thereof, to the amount of the judgment. After the introduction of the evidence the court instructed the jury peremptorily to return a verdict in favor of plaintiff for the sum of \$3,663.35, being the aggregate amount of all payments made by plaintiff upon his certificates issued by the old corporation in 1879, and in 1885, to said old corporation, to the unincorporated society and to defendant herein, and interest thereon from date of each payment. The

jury returned a verdict as directed, and judgment was entered in accordance therewith.

Appellant presents several assignments of error and urges many propositions thereunder in support of its contention that the trial court erred in directing the jury to return the verdict rendered. We do not regard it necessary to state and discuss seriatim the propositions contended for by appellant, and shall state, without regard to the order in which these propositions appear in the brief, our conclusions, which will sufficiently indicate the questions raised.

1. We are not aware of any authority supporting the contention of appellant that the question, (or any of the questions), presented for decision to be one of exclusive "federal jurisprudence,"

288 and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant in this case. It is true, that the charter of the defendant was granted by a Special Act of Congress, which conferred upon the corporation general authority to amend its constitution, at pleasure, provided such amendment did not conflict with the laws of the United States, or of any state, but this fact does not sustain the proposition that such is the character of the questions involved. It may be said, however, in passing, that the conclusion we have reached upon the main question presented for determination is, we think, supported by decisions of both federal and state courts.

2. The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, — received and accepted from appellee monthly payments of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance by it and broken. Evidently, defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the

289 defendant's charter, which is set out in our statement of the facts, obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof.

3. The contention that the undisputed evidence shows that any claim plaintiff may have had against defendant was barred by the statute of limitation of two years, is not sustained. This contention is based upon the assertion that in his original petition the appellee alleged that the defendant had issued and executed to appellee the certificates set up in said petition, and that subsequently appellee abandoned said cause of action, and on February 14th, 1913, more than two years after the passage of the laws complained of, filed an amended petition in which he predicated his claim against defendant upon its implied liability to him. It need only

be said in disposing of this contention, that a careful reading and comparing of appellee's original and amended petitions discloses no material difference in the causes of action alleged. Both petitions, upon substantially the same alleged facts showing liability on the part of defendant, seek the same relief, namely, damages for the breach of the written contract set up, as evidenced in part by said contract itself and in part by the laws of the defendant and the corporation making it.

4. The re-rating of appellee, whereby the assessments against him were so greatly increased, was, we believe, unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon
 290 it. *Ericson v. Supreme Ruling Fraternal Mystic Circle*, 105 Tex., 170; *American Legion of Honor v. Batte*, 34 Tex. Civ. App., 456, 79 S. W., 629; *Morton v. Supreme Council of Royal Leane*, 73 S. W. (Mo.), 259; *Smythe v. Supreme Lodge, Knights of Pythias*, 198 Fed., 967, *Pearson v. Knights Templars & Masons' Life Ind. Ins. Co.*, 89 S. W., 588; *Beach v. Supreme Tent Of K. of M.*, 177 N. Y., 100, 69 N. E., 281; *Wright v. Maccabees*, 196 N. Y., 391, 89 N. E., 1078; *Dowdall v. Supreme Council Catholic Mutual Benefit Ass.*, 196 N. Y., 405, 89 N. E., 1075; *Rockwell v. Knight Templars & Masonic Mut Aid Ass.*, 119 N. Y., Supp., 515; *Ayres v. Order of United Workmen*, 188 N. Y., 280, 80 N. E. 1020.

As has been seen, the plaintiff in his application for the certificates issued to him in 1879 and 1885, agreed to conform to and obey the laws, rules and regulations of the order governing the endowment rank of the old corporation, "now in force, or that may hereafter be enacted, or submit to the penalties therein contained;" that the certificates issued to him were conditioned that "in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted," there would be paid to Mary J. Mims, plaintiff's wife, the sums therein specified, and declared that it was understood and agreed that any violation of the mentioned conditions therein, or the requirements of the laws in force governing said rank should render the certificate void; that in the laws passed in 1884 it is provided that "these laws may be altered or amended at any
 291 regular session of the Supreme Lodge, Knights of Pythias by a two-thirds vote"; that the amended laws of 1910 provided that "the right to change, increase or adjust the schedules of rates in the fourth and fifth classes, respectively, or any of them is reserved to the Supreme Lodge, as is also the right to apply any such change, increase or adjusted schedule of rates to all members as of the date of their adoption, without regard to the date of any member's certificate," and that the constitution of the old or original corporation concluded with the provisions that, "said Supreme Lodge shall have power to alter and amend its constitution and by-laws at will," etc. It is upon these provisions of appellee's certificate and laws of the order that appellant's claim of right to re-

rate appellee is predicated, and from time to time, after he became a member, up to and including the last raise in August, 1910, his assessments were gradually increased. But at the time the certificate for three thousand dollars mentioned in appellee's petition was issued to him, he, according to his undisputed testimony, was furnished by the local secretary of the order with a schedule of what the rate of his assessment would be if he went in the fourth class of the endowment rank, and this rate of monthly assessment was fixed at \$3.60, said assessment being based upon the average expectancy of appellee's life, and was to continue the same so long as his membership continued. The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him and the reservation of a general power to amend its by-laws, nor the

292 recitation in said contract to the effect that it was issued upon the condition that the appellee paid to the endowment rank "all monthly payments as required and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted," authorize appellant to increase the rate of assessments as the record discloses was done. While a fraternal insurance society or association may so amend its constitution and by-laws to make "reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implicitly by the contract itself." And it seems clear that such a corporation may expressly reserve the right and power to increase the monthly assessments of its members, but such reservation must be so explicitly and clearly stated in the contract itself or in some paper forming a part of the contract, that the member insured is fully advised that the terms of the contract he is entering into may be changed by the insurer in that respect. By the terms of the certificate issued to him, and the by-laws fixing the rate of his monthly assessment at the time of its issuance, which became and was a part of said contract, appellee knew what he was obligated to pay and what he was entitled to receive, and under the general reservation to amend its constitution and by-laws and the general stipulation in the contract, to the effect, that, appellee would pay "all monthly payments as required and fully comply with all the laws governing the endowment rank, as a condition upon which the money

293 therein specified was to be paid to his beneficiary, no amendment materially changing and impairing the contract as made with him could be enacted or adopted that would be binding upon him. Numerous cases hold to this doctrine, many of which arose in the State of New York.

From the syllabus in *Dowdall v. Supreme Council of the Catholic Mut. Ben. Ass.*, supra, we quote the following: "The defendant, a mutual benefit life insurance association, issued to plaintiff a certificate of membership therein, upon the condition that he should 'in every particular while a member of said association comply with all the laws, rules, and requirements thereof.' Plain-

tiff also received a printed book containing the constitution and by-laws of defendant. One of the articles of the constitution provides in substance, that all members should be assessed according to their age when admitted. The question presented is whether, by subsequent amendment of the constitution or any of the rules or regulations made after the issuance of the certificate, defendant may increase the rate of a single assessment against plaintiff. Held, that the covenant on the part of plaintiff that he would comply with all the laws, rules, and requirements of the association refers to such as existed at the time he entered into his contract, and that any changes or alterations thereafter made therein, or additions thereto, seeking to modify or alter said contract do not bind him." In *Rockwell v. Knights Templars & Masonic Aid Ass.*, 119 N. Y. Supp., 515, it is said: "It is repugnant to the idea of a contract that one of the parties may at his election, from time to time change the amounts which he is to receive

294 from the other party under the contract and the consideration which he is to render to the other contracting party, and if it is possible to make such contract, the language used must permit of no other construction. The period and rate table endorsed upon the plaintiff's policy became a part of it, and there is no suggestion in it, or in the policy itself, that that table may be changed." In that case it is further said: "Every corporation has the right to make and change its by-laws in a manner not inconsistent with law, but such right does not give it the power to change its written contract, or impose upon a party contracting with it obligations which were never assumed." *Morton v. Supreme Council of Royal League*, cited above, reviews the authorities upon the subject at considerable length. In that case, after a review of the authorities, the court say: "The foregoing cases were all decided on the theory that subsequent by-laws, despite the member's agreement to comply with them, cannot defeat or abridge the essential rights created by the policy, but affect only the member's duty as such, not his interests as a contracting party. In all of them we find the same argument here advanced and accepted by some courts that the business experience of such companies shows them what regulations ought to prevail and it is necessary that they be permitted to avail themselves of the teaching of experience by enacting new regulations, as needed, to bind all members and control all agreements. There is some merit in that argument, and it is pertinent to any legislation respecting contracts. It has not been thought, however, sufficiently meritorious to permit state legis-

295 so to permit insurance societies." This view is approved by our Supreme Court in *Ericson's case*, and adhering to the principle therein announced and as announced in the other cases cited above, it must be here held that the laws and amendments passed after appellee's contract of insurance was nettered into were prospective in their operation and should not be given a retroactive effect; that the reservation by appellant of the general power to amend its constitution and by-laws, and the provisions in appellee's certificates to

which we have referred relate only to the member's duties and obligations as such and do not authorize a radical change in the terms of his insurance contract, as was attempted to be made by the raised assessments. This being true it is immaterial that the appellee may have occupied the position of insured and insurer and whether the increase in the rate of appellee's assessments was reasonable or necessary to continue the financial existence of the corporation. In *Rockwell v. Knights Templars & Mas. Mut. Aid Ass.*, supra, it is said: "But every contract has at least two parties who stand as separate entities; each dealing with the other at arm's length. The fact that one of the contracting parties is a stockholder or member of the corporation does not permit the corporation by an alleged change of its by-laws to alter the terms or effect of contracts which it has already made. The fact that a contract proves unprofitable, or will bring ruin upon one of the contracting parties, is no reason why the courts can permit the party who has made such unwise contract to change its terms at will, and make for itself a more profitable contract." The plea of necessity is never a valid defense against the performance of a contract. *Poole v. Supreme Circle, Brotherhood of America*, 85 Atl. Rep., 821.

We may also add in this connection, without expressly deciding the question, as it is not raised by any specific assignment of error, that the fact that a holder of a certificate issued by a benefit association pays illegal assessments levied against his certificate in violation of his contract, as was done in the case at bar, rather than take the possible change of having his certificate forfeited, does estop him or his beneficiary from questioning the legality of subsequent similar assessments. This view is affirmed in the case of *Benjamin v. Mutual Reserve Fund*, 79 Pac. (Cal.), 517. In that case the point was made that the member had legalized the insurance company's action in demanding an otherwise illegal assessment by reason of having paid a number of prior such assessments without question or protest, and the court in holding against the contention, said: "Assuming this to be true, it affords the association no ground for invoking an estoppel, for at least two reasons. In the first place, the appellant can not take advantage of its own wrong, which would be the result if its claim of estoppel was sustained. 'These prior calls' were demanded under an implied threat that unless paid the policy would be forfeited, and were paid under a moral compulsion. As said in *Duggans v. Covenant Mutual*, 87 Ill. App., 416: 'It certainly can not be said that Tuttle in paying previous illegal assessments acted fraudulently, or that he wilfully did anything calculated to mislead others to their injury. When he paid illegal assessments he did so under a moral compulsion and a threat, implied at least, that if he did not pay his certificate would be forfeited, and the provision made for his wife at the time of his death would be thereby lost. Can appellant be permitted to take advantage of its own wrong? We think it can not.'"

We shall not undertake to review the many cases cited by able counsel for appellant in support of his contention that the re-rating

of appellee was authorized and hence not a violation or repudiation of his contract. It will suffice to say that, as we understand, those cases mainly relied on were not followed or were not regarded applicable by our Supreme Court in *Ericson v. Supreme Fraternal Mystic Circle*, supra, and that we see no distinction in principle in that case and the case at bar.

5. The measure of damages as fixed by the court in his peremptory instruction to the jury is the correct one in a case of this character. Having breached appellee's insurance contract, appellant is liable to him for the aggregate amount of all premiums or assessments paid under said contract with legal interest on each payment from the date it was paid. *Ericson v. Supreme Ruling, etc., supra*, *Washington Life Ins. Co. v. Lovejoy*, 149 S. W., 398; *Black v. Supreme Council, etc.*, 120 Fed., 580.

6. The fourth assignment of error is not presented in accordance with the rules and is not therefore entitled to consideration.

298 The propositions under said assignment are in substance, to the effect, that the court erred in permitting the twofold benefit certificates issued to appellee to be read in evidence, (1) because there was no proof of their execution; (2) because there was no authority either in the character of the old corporation or of the defendant herein for the assumption of said certificates by the defendant; and, (3) because the testimony showed that these certificates had been surrendered by a new one issued in 1885. It does not appear in the statement made under this assignment and the propositions urged thereunder that the alleged errors of the court were made grounds for a new trial in a motion filed therefor in the district court, and the statement is otherwise defective and not in compliance with the rules in that no part of the evidence relating to or bearing upon the propositions is given. We are simply referred to "preliminary statement, pp — of this brief, and to the statement under proposition under first assignment of error p. — of this brief." The preliminary statement covers 28 pages of the brief, including much matter that does not bear upon the questions raised by the assignment, and the statement under the propositions urged under the first assignment, to which we are referred, covers about 32 pages of the brief, and contains much evidence relating to entirely different questions from those presented in this assignment. To determine whether or not the propositions here contended for are supported by the record we would have to search the entire evidence stated in the preliminary statement and under the first assignment of error.

299 This we are not required to do. Practically the same questions, however, are raised by the fifth assignment, which we have concluded to consider with the conclusion reached that the assignment should be overruled. As pointed out by counsel for appellee, the execution of the insurance contract by the old corporation was charged in plaintiff's pleadings, as well as the assumption thereof by defendant, and neither allegation was denied by defendant, under oath. In fact, it occurs to us, that defendant, in its pleadings, practically admits the issuance of this contract, and its assumption by it. However, the admission of the contract or certifi-

cate could not have so prejudiced appellant as to require a reversal of the case, because the uncontroverted evidence, independent of said contract, shows appellee's rights as fully and practically to the same extent as the contract in question. The Supreme Secretary of the appellant testified fully that appellee in May, 1885, became a fourth class member of the old corporation to the extent of three thousand dollars' benefit, and fully defined his rights as such. The execution of said contract and its assumption is sufficiently shown by the evidence of said witness, wherein he testified that the written notice as sent to appellee by appellant in October, 1910, mentioned said contract, giving the appellee's name, the number of the certificate, the amount of the benefit, and the monthly rate then being paid thereon. This and other evidence in the record so fully shows the execution of the certificate or insurance contract and appellant's

assumption of it that to reverse this case for want of more direct and positive proof thereof would be highly technical.

300 7. The assignments complaining of the rejection of certain evidence offered by appellant, the admission of evidence offered by appellee and the refusal of appellant's requested instruction to the effect that there was no evidence that appellant assumed the payment of the contract of insurance upon which this suit is based, disclose no reversible error and are overruled.

Believing the proper judgment has been rendered in the case it is affirmed.

TALBOT,
Associate Justice.

Delivered March 14th, 1914.

No. 6997. Supreme Lodge Knights of Pythias, Appellant vs. S. Mims, Appellee. Filed in Court of Civil Appeals Mar. 14, 1914, Geo. W. Blair, Clerk 5th District. Filed in Supreme Court Jul- 2, 1914, F. T. Connerly, Clerk. Rec. 5-30-14-Vol. 20-p-556.

6997.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
vs.
S. MIMS.

From District Court, Dallas County.

Opinion of the Court Delivered by Mr. Talbot, Associate Justice.

Judgment Ct. Civil Appeals.

SATURDAY, March 14, 1914.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the
301 court below be in all things affirmed; that the appellee, S.

Mims, do have and recover of appellant, Supreme Lodge, Knights of Pythias and National Surety Company, its surety upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, Texas.

No. 6997.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,

vs.

S. MIMS, Appellee.

Appealed from the District Court of Dallas County.

Appellant's Motion for Rehearing.

Now at this time comes the Supreme Lodge Knights of Pythias, appellant in the above numbered and styled cause, and moves the court to set aside the judgment of affirmance rendered in this case on the — day of March 1914, and to grant appellant a re-hearing for the following reasons, to-wit:

I.

Because the court erred in holding in the first subdivision of its opinion that the construction of the Federal charter, which confers the power and controls the exercise of the powers conferred upon appellant in this case, involves no Federal question upon
302 which the decisions of the United States Supreme Court should be and are conclusive.

II.

The Court erred in holding that by the following provision of its charter, granted by the United States Congress, to-wit:

"SECTION 3. That all claims, accounts, debts things in action, or other matters existing for or against the present Supreme Lodge Knights of Pythias mentioned in Section "1" of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitation of time," appellant assumed the contract made or alleged to have been made by and between appellee Mims, and the old corporation, whose charter expired in 1890, as evidenced by the certificate sued on in this case, issued by said old corporation to appellee in the year 1885, and that appellant obligated itself by said provision to carry out said contract, because said holding by this court is contrary to the express terms of the above provision in appellant's charter and the construction placed

by this court upon said provision of said charter makes appellant responsible for a contract made by appellee with an old corporation, whose charter expired in 1890, which old corporation could not have been in existence at the time, to-wit: June 29, 1894, when appellant obtained its charter, and which old corporation could not
 303 under the facts of this case be held to be the present Supreme
 Lodge Knights of Pythias referred to in said above stated provision.

III.

Because the court erred in holding as shown by its opinion in this case, that under said charter granted to appellant June 29, 1894, by the United States Congress that notwithstanding the provisions of said charter, appellee, who became and was one of the members of said appellant corporation since June 29, 1894,—the date of appellant's charter,—could recover from appellant \$3663.35—the aggregate amount of all payments made by plaintiff or appellee upon certificates issued to him by the old corporation in 1879, and in 1885 paid to said old corporation by appellee, and the amount of all payments paid by appellee to the unincorporated society and to this defendant, and interest thereon from date of each payment—said judgment, *or* said amount, to be paid by this defendant out of its Endowment Rank Fund, or any other fund or funds of defendant into which, upon trial it may be shown the payments to defendant have been made—said judgment to be a lien upon said fund or funds with foreclosure thereof to the amount of said judgment.

III½.

Because the court erred in holding for naught Section "2" of said original charter, which provides, that the said corporation (that is, this defendant) shall have the power to take and hold real and personal estate not exceeding in value \$100,000 which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation"; and this court in holding that appellee could recover the above amounts to be paid out of the
 304 funds of this defendant, has placed a construction upon said
 provision of said charter in direct conflict with the validity of same, and in direct conflict with its express language the construction placed by the court in its opinion and judgment in this case, and the effect of the judgment and opinion of the court in this case being against the validity of said provision in said charter, and in direct conflict with its express language, as also with the express language of the amendment to said charter subsequently adopted, as shown by the statement of facts in this case.

IV.

Because the court erred in its opinion in holding and determining that the assumption in its charter of certain obligations of the present Supreme Lodge, Knights of Pythias, which was an unincor-

porated society included the obligation of the Supreme Lodge, Knights of Pythias, towit, the old corporation that had expired in 1890.

V.

Because the court erred in the second sub-division of its opinion in holding that as a matter of law, although the charter of the corporation issuing the contract sued on in this case expired in 1890, and although defendant, appellant corporation, was not organized until 1894—four years thereafter—this defendant became liable on the contract of said old corporation, because it absorbed the membership of the old corporation and of the unincorporated society referred to in this court's opinion, and accepted monthly payments on the contract issued by the old corporation—said
 305 acceptance of said monthly payments and dues being only from the date of the organization and incorporation of this defendant.

VI.

Because the Court erred in determining and holding in its opinion that the provision of the charter granted by the Federal Congress, June 29th, 1894, permitting it to hold real and personal estate not exceeding in value \$100,000.00, and which declared that it should not be divided among the members of the corporation, but should descend to its successors for the promotion of the fraternal and benevolent purposes of said corporation was without effect, and that the property on hand could be divided and applied to the payment of an alleged amount of damages suffered by the plaintiff by reason of the alleged breach of his contract.

VII.

The court erred in not determining that under the terms of the charter of appellant its liability must be measured and controlled by the laws existing at and subsequent to the date of appellant's charter under which appellant was authorized to transact business, and not governed by the laws not in existence at the date of said charter, but those in existence at the date when the certificates were originally issued.

VIII.

Because the court in holding that under the law the mere fact that appellant took over and absorbed the membership and insurance business of said corporation, and said unincorporated society which succeeded it, if it be a fact, and that appellant from the date
 306 of its incorporation in 1894 up to January 1911, received and accepted monthly payment of dues and assessments from appellee would under the law be sufficient to charge appellant with the performance of a contract made by and between appellee and said old corporation in the absence of an express assumption of the performance of said contract authorized by the charter of appellant.

IX.

The court erred in the third subdivision of its opinion in holding that the contract set up in appellee's original petition was identical with, or substantially the same, as the one described in the amended original petition upon which the trial was had in this case, in the following particulars, to-wit:

The contract sued on and set up in the original petition was described as having been issued by the defendant corporation, whereas the amended petition described the contract as having been issued by a corporation which had no existence at the date this defendant corporation was chartered—the court thus holding in effect that a petition describing a note sued on as having been made and issued by John Smith, is equivalent to a cause of action set up in an amended petition which describes the note sued on as having been executed by Tom Jones.

X.

Because the court erred in all that portion of its opinion in this case wherein it holds that the plaintiff's cause of action as set up in its amended petition was not barred by two years' statute of limitation.

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XI.

Because the court erred in not holding that inasmuch as there was no express assumption by the terms of the charter of the indebtedness of the old corporation, if the defendant were liable, it was a liability on an implied contract or implied assumption, and that all causes of action were barred after two years.

XII.

Because the court erred in all that portion of its opinion in the fourth paragraph of same wherein it held that the re-rating of appellee by laws passed by appellant in 1910, and complained of by him in this case was unauthorized, and constituted such a repudiation and breach of appellee's insurance contract sued on in this case, as entitled him to recover damages therefor, notwithstanding the fact that the evidence conclusively showed that without raising such rates said contract would have no value, and that it would be impossible to perform said contract, or any other of the many similar contracts existing at said date.

XIII.

The court erred in holding that the raising of the said rates constituted a breach of the said contract because the records in this case disclose the fact that in the application made for the certificates, and in the certificates themselves, and by his own oral testimony taken on the trial of this case, at the time he received said certificates and the policy sued on he expected that the rates would not be stationary, but that they would be increased or diminished as the necessities of the organization might demand.

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XIV.

The court erred in holding that the charter of appellant did not authorize it to pass any by-laws increasing the rates of appellant.

XV.

The court erred in not holding that the charter of appellant, the by-laws of appellant, the application and certificates of appellee described in the record construed both separately and together did not authorize the defendant corporation to raise the rates.

XIV½.

Because the court erred in not holding that the issuance of certificates for stated amounts impliedly authorized appellant to levy necessary assessments to pay those amounts at maturity.

Argument.

Appellee being a member of this defendant corporation, which was and is a fraternal society, and occupying a dual position—being the insured on the one hand, and as such entitled to the benefits conferred upon him by his contract, and on the other hand being an insurer, and as such bound to comply with all the laws of the society and contribute to its funds a sufficient amount to enable the society to carry out its contracts with its members, appellee, where the necessity existed, as was shown by the evidence in this case, to re-rate its members by appellant, and where such raise in rates was reasonable, as was shown to be the case in this case, was compelled as one of the insurers in appellant society, and was under the law bound by the re-rating of the members of appellant corporation, as was done by the laws enacted in 1910, complained of in this case.

(2d). The undisputed evidence in this case showing that under the charter of the old corporation, which issued the certificate sued on in this case to appellant the right of amendment was reserved, and the undisputed evidence in this case further showing that under the laws existing at the date appellant obtained the contract from the old corporation sued on in this case, and existing subsequent to said date, the right of amendment of said laws was reserved and existed, and the undisputed evidence further showing that appellee in his application made to said old corporation upon which said certificate was issued to him, agreed that his contract should be governed by all the laws, rules, and regulations of the Order then in force, or that might thereafter be enacted, and the undisputed evidence further showing that in the certificate issued to appellee by said old corporation, and sued on in this case, it was expressly provided that said certificate was issued to appellee in consideration of the payment thereafter to said endowment rank of all monthly payments as required, and the full compliance with

all the laws governing said rank then in force, or that might thereafter be enacted, and in consideration of appellee's compliance with such laws, etc., and his being a member in good standing under said laws, the re-rating of appellee, as was done by appellant by the laws passed in 1910, was authorized and was legal under the laws and facts of this case, and such re-rating did not constitute any repudiation or breach of appellee's contract sued on in this case, even though under the facts of this case it should be found that

310 appellant assumed and obligated itself to carry out the contract of appellee made with said old corporation, and sued on in this case, and this court, therefore, erred in holding that the re-rating of appellee was unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it, and this is the law irrespective of the fact as to whether or not a by-law may or may not have existed at the time the certificate sued on in this case was issued by said old corporation providing that the rates of assessment should remain the same as long as a member remains a member of the society.

(b) The undisputed evidence in this case showing that the certificate sued on by appellee was a certificate issued in 1885 by an old corporation, whose charter expired in 1890, and the undisputed evidence further showing in this case that after the expiration of the charter of said old corporation an unincorporated society, known as the Supreme Lodge Knights of Pythias, transacted business from 1890 to 1894, when this defendant was incorporated by an Act of Congress approved June 29, 1894, and there being absolutely no evidence in this case showing any written or direct assumption of any liability on the contract sued on by appellee by said unincorporated society, and the evidence utterly failing to show that said unincorporated society obligated itself to carry out appellee's contract with said old corporation, and the evidence not only failing to show that said incorporated society and this defendant received any funds or assets from said old corporation, or of said old corporation—the evidence on the other hand which was undisputed,

311 showing that this defendant received no funds or assets either from said old corporation, or said unincorporated society, as a consideration for any obligation on its part to carry out and perform appellee's contract with said old corporation, and the undisputed evidence further showing that the laws of said old corporation from 1888 to 1890, when its charter expired, and that the laws of said unincorporated society under which it began and continued to transact its business from 1890 to the year 1894, when this defendant was chartered, and the undisputed evidence further showing that under the laws, constitution, and charter of this defendant existing at and subsequent to the date of its incorporation, and under which it transacted business, the right to re-rate, as was done by this defendant in 1910, existed, and was authorized, and the undisputed evidence further showing that the plaintiff at the date of the incorporation of this defendant became a member of this defendant corporation and a member of one of its sub-ordi-

nate lodges, and the undisputed evidence further showing that from said date down to January, 1911, the plaintiff acquiesced in and complied with the laws and constitution of this defendant, plaintiff's rights, if any, against this defendant, and this defendant's liability, if any, to plaintiff, must be governed and controlled by the constitution, laws, rules, and regulations of this defendant, and under said constitution, laws and regulations as shown by the evidence in this case that the undoubted right to raise the rate of assessments complained of in this case, existed, this court erred in holding that the re-rating of appellee was unauthorized, and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it.

(c) The undisputed evidence in this case showing that the plaintiff surrendered the two certificates issued to him in 1879, and received in lieu thereof, and in consideration of the surrender and cancellation of the same, the certificate sued on in this case, issued to him in 1885, under the law, plaintiff could not recover of this defendant, even if it was liable for a breach of the contract sued on in this case, any amounts paid on said surrendered and cancelled certificates in any event, and the court, therefore, erred in this case in holding that the re-rating of appellee was unauthorized, and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the amounts, with interest thereon, paid by appellee on the certificates issued to him in 1879, and surrendered and cancelled in 1885, when the certificate sued on in this case was issued in lieu of said certificates, and in consideration of the cancellation and surrender of same.

(d) The undisputed evidence in this case showing that the re-rating complained of, as was done by the laws adopted in 1910 by this defendant, was not only necessary but reasonable, and that such re-rating was necessary to be done for the preservation of the existence of appellant's society, and to enable its membership and its members to carry out their mutual and dual contracts for and with each other—such re-rating was but the exercise of a power inherent in defendant's corporation for the purpose of preserving its life and protecting its certificate holders, and such re-rating was therefore authorized and within the power of this defendant corporation, and did not constitute under the law a repudiation or breach of the appellee's insurance contract sued on in this case, and the court erred, therefore, in so holding.

Authorities.

Eversborg v. Supreme Tent, 77 Swn. 246.
 United Benevolent Association vs. Cass, 119, Swn., 123.
 Modern Woodmen vs. Lynch, 141 Swn. 1055.
 Korn vs. Mutual Insurance Society, 10 U. S. p. 192.
 Wright v. Minn. Life Insurance Co., 193 U. S. 657.
 Polk v. Mutual Reserve Fund, 207 U. S. 327.
 Fullenwider vs. Supreme Com. Royal League, 186 Illinois, 621.

- Grant vs. Mutual Reserve Asso., 121 Fed. p. 403.
 Messer vs. Grant Lodge United States Workmen, 180 Mass., 321.
 Wineland vs. Knights of the Maccabees, 148 Mich., 608.
 Williams vs. Supreme Council, C. M. B. A. 152 Mich., 1.
 Reynolds vs. Royal Arcanum, 192 Mass., 150.
 Supreme Lodge K. of P. vs. Knight, 117 Ind. 489, 3 L. R. A., 409.
 Barbot vs. Mutual Reserve Fund Life Ass'n. 100 Ga. 681.
 Mutual Reserve Fund Life Ass'n vs. Taylor, 99 Va., 208.
 Richmond vs. Supreme Lodge Order of Mutual Protection, 100 Mo. App. 8.
 Miller vs. National Council K. & L. of S., 69 Kan. 234.
 Woodmen of the World vs. Woods, 34 Colo., 1.
 Shepperd vs. Banker's Union of the World, 77 Neb. 85.
 Conner vs. Golden Cross, 117 Tenn., 549.
 Champion vs. Hannahan, 138 Ill., App. 387.
 Pierce vs. Bankers' Union, 140 Ill. App., 495.
 314 Mock vs. Supreme Council Royal Arcanum, 121 App. Div., (N. Y.) 474.
 Haydel vs. Mutual Reserve Fund Life Ass'n, 98 Fed. 200.
 Haydel vs. Mutual Reserve Fund Life Ass'n, 104 Fed. 718.
 Supreme Ruling of the Fraternal Mystic Circle vs. Ericson, Court of Civil Appeals, Texas, decided June 22, 1910, 131 S. W. 92.

See also authorities on pp. 32, 40, 41, 44, 46, 48 and 49 of our brief filed in this case.

See also Thompson on Corporations, Vol. 1, Sec. 1019, and authorities cited in Note 38. The case of Smith vs. Supreme Lodge, K. of P., referred to in the court's opinion in this case should not be regarded as authority, as shown by letter from the General Counsel of the Supreme Lodge to us in that case. An appeal was taken in said case, to the Supreme Court of the United States, and said appeal is undisposed of. After this appeal was taken the complainants themselves requested the attorneys for the Supreme Lodge to stipulate with them that the appeal might lie until the United States Supreme Court decided the case of Green vs. Royal Arcanum which was the leading New York case on the subject referred to in this court's opinion, and in which case a writ of error had been granted by Justice Hughes of the Supreme Court of the United States. It was and is accepted by the counsel for both sides in the Smith case that the Supreme Court of the United States in the case of Green vs. Royal Arcanum would finally determine the law applicable to the case of Smith vs. Supreme Lodge, K. of P. And the fact is as stated in said letter from the General Counsel of the Supreme Lodge who was the attorney for the defendant in the Smith case, the complainants or the attorneys for the complainants in said case did not

315 seem to have any great confidence in the decision of the lower court being sustained, and thus requested the stipulation and agreement that the appeal taken in the Smith case might abide the decision of the Supreme Court of the United States in

the case of Green vs. Royal Arcanum. Outside the courts of New York, Missouri and possibly North Carolina there is scarcely a decision by a respectable court deciding that under facts similar to the ones in this case the right to re-rate did not exist.

The above authorities cited in our brief amply support the proposition contended for by us and set out in sub-division "b" under paragraph "IX" of this motion for rehearing. This court predicates its opinion in this case largely upon the opinion of the Supreme Court in the case of Ericson vs. Supreme Ruling Fraternal Mystic Circle, 105th Texas, page 170. An analytical examination of that case will in our opinion convince this court that the statement in said opinion to the effect that the provision in Ericson's policy by which he agreed to comply with the orders and by-laws adopted in future, had reference only to such regulations as have reference to the member's duties and conduct as a member, and did not embrace an act that would produce a radical change in his rights, was nothing more than dicta in the opinion of said court.

This is made evident, when, as will be seen upon an examination of said opinion, the court had held that the re-rating laws sought to be applied to Ericson's contract were not applicable to said contract, for the reason that the language of the amendment of 1907, 316 providing for the re-rating, did not include members "therefore taken over from other orders," and as Ericson was a member "therefore taken over from another order," said amendment and said re-rating laws could not be applied to his contract. It was wholly unnecessary to the decision in said case for said court to use the language it did in reference to the construction of the language in Ericson's policy by which he agreed to comply with the orders and by-laws adopted in future.

In addition to this we desire to remark that in that case there was no question raised either in the lower court or in the Court of Civil Appeals as to the measure of damages. The fact is, and this will be shown by an examination of the record of said case, that there was no assignment of error on the question as to whether or not the amount of assessments paid, with interest thereon, was the proper measure of damages to be recovered upon a breach of the contract sued upon. In addition to this the language used in that case, and in the case at bar, as shown by the application and the certificates and the laws existing at the date when appellee obtained his certificate in 1885, were entirely different—the language of appellee's contract, as evidenced by his application, his certificates, and the laws in existence at the date when the certificate was issued to him, being much stronger, and when taken together unquestionably showed that it was contemplated by the parties to the contract sued on, that the right to increase the rate of assessment existed and was agreed to.

In the contract of appellee in this case, there is a direct reference to the assessments, and his agreement as embodied in his 317 certificate and shown by his application, and the laws of the Order taken in connection with his certificate, make it perfectly apparent, it seems to us, that both parties to the contract sued

on in this case understood that appellee was binding himself to comply with any future reasonable change in the rates of assessments existing at the date his contract was made. In fact an examination of appellee's own testimony in this case will show that he so understood his future liability. The same construction then seems to have been placed upon the contract as to the right to increase the assessments by both appellee and the corporation that issued to him his certificate.

The New York cases referred to by the court in its opinion as sustaining the proposition announced in the opinion seem to support the conclusion of the court upon this point. The truth is, however, an examination of most of the New York cases referred to will show the court that the cases that announced the proposition adhered to by the court in its opinion to the effect that the re-rating of appellee was unauthorized, were cases where there had been an attempt to reduce the amount of benefit to be paid the holder of a certificate, and not cases in which an attempt was made by the society to raise the rate of assessments.

We ask the court to examine the note to the cases of Dowdall vs. The Supreme Council, reported in 31st L. R. A. (N. S.) page 417, where the effect of this and other New York decisions is considered. The overwhelming weight of authority in this country, as will be shown by an examination of the authorities cited by us

318 in our brief, and in this motion, upon the question of re-rating by fraternal beneficiary societies is opposed to the decisions in the State of New York. In fact, the overwhelming weight of authority sustains the right to increase rates, and this line of authorities by eminent courts is broken only by the cases reported in New York and referred to by the court in this opinion, and some cases in Missouri and in North Carolina. If the court will examine the case of Eversburg vs. Supreme Tent, 77th S. W., 246, in which case a writ of error was denied by the Supreme Court, the distinguished Chief Justice who rendered the opinion in the Ericson case being at said time a member of said case, this court will see that the opinion in the Eversburg case is in direct conflict with the dicta of Judge Brown in the Ericson case as to the right to raise the rate of assessments, and that the Eversburg case is in direct conflict with the case of Morton vs. Supreme Council, reported in 73d S. W. 259—a Missouri Court of Appeals decision—to which Judge Brown refers as an authority for his dicta in the Ericson's case, and to which this court refers as an authority for its opinion on the question of re-rating. The Ericson case, or rather the dicta of Judge Brown in the Ericson case on the question of the right to raise the rate of assessments is also in our opinion directly opposed and in conflict with the decisions in the case of the United benevolent Association vs. Cass, reported in the 119th S. W. page 123, which case was a re-rating case, and in which case also a writ of error was refused by the Supreme Court, the distinguished Chief Justice who rendered the opinion in the Ericson case being at said time a member of said court.

319 In the case of *Modern Woodmen of America vs. Lynch*, reported in 141 S. W. 1055, it was held that where an applicant made an application to a fraternal society, and recited in his application that he would conform to all by-laws then in force, or thereafter adopted, that the applicant was bound by subsequently enacted laws, and that the application, the benefit certificate, and the by-laws of the society, with the amendments thereto, constituted the contract of insurance as between the applicant and the fraternal society.

The court erroneously held that the rights of appellee against appellant in this case, and the liabilities of appellant to appellee under the contract sued on in this case, were to be determined by the laws existing before the date of the incorporation and charter of this defendant, and was not, therefore, to be determined by the charter, constitution, and laws of this defendant under which it began transacting business in 1894, and at which time appellant became a member of this defendant corporation, and a member of one of its subordinate lodges. In our opinion this holding of this court is directly contrary to the law in this and every other state in this Union, and the opinion of this court in effect overrules the opinion of our own courts, the opinion of the courts of Missouri, and the opinion of the Supreme Court of Michigan, as well as the opinion of every other court where the question has been passed on, and the statement and conclusion of learned text writers upon the subject of fraternal insurance laws.

If this court will take the time to carefully examine the case of *Bollman vs. Supreme Lodge*, 53d S. W. Rep. 725, in which
320 a writ of error was refused by our Supreme Court, and the case of *Gibbs vs. K. of P. of Missouri*, 158 S. W. p. 11, and the case of *Winland vs. Knights of Maccabees*, 145th Mich. p. 608; 112th N. W. Rep. p. 696, it seems to us that this court must necessarily be forced to the conclusion that appellee's rights against this defendant, and the defendant's liabilities to appellee upon the contract sued on in this case must be determined under the charter, constitution, and laws of this defendant, existing in 1894, and under which it was transacting business when its charter was granted. It seems to us that there is no escape from the conclusion expressed in the language used by the court in the case of *Winland vs. The Knights of Maccabees*, referred to above, where the court used the following language in passing upon the question as to whether the plaintiff in that case was bound by a raise in his rates of assessments. The language of the court is as follows:

"We are of the opinion that after the lapse of ten years it is too late for one who was a member when re-incorporation took place to insist that the certificates then in existence shall be treated otherwise than as if they had been issued by the defendant after such incorporation."

We have made diligent search, but have been able to find no authorities conflicting with the propositions laid down in the above case. The proposition contended for by us is also in our opinion supported by Niblack on benefit societies and accident insurance,

2nd. Edition, Sec. 18, pp. "33-34", and by the statement and authorities cited in 29th Cyc. of Law p. 70. We also ask the Court
321 to examine the long list of authorities holding, as contended by us in this case, in Thompson on Corporations 2d Ed. Vol. 1, Sec. 1019, et seq., and authorities there cited.

XV¾.

Because the court erred in holding in the fourth subdivision of its opinion, that the re-rating of appellee, whereby the assessments against him were increased, was unauthorized, and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it to the unincorporated association which operated for four years, and to the deceased corporation, although it was distinctly shown that none of the premiums paid to the extinct corporation, or to the unincorporated society, were ever delivered or paid to the defendant in this case, and because it was distinctly shown that this defendant obtained none of the assets or funds of either said unincorporated society, or said extinct corporation, and received no consideration from either of them for obligating itself to carry out the contract of appellee sued on in this case.

XVI

The court erred in the fourth paragraph or subdivision of its opinion in holding that the re-rating of appellee whereby the assessments against him were increased, was unauthorized and constituted such a repudiation or breach of his contract as entitled him to recover in this action the sums paid upon it to the unincorporated association, and to the deceased corporation, because if there was no written or express assumption of said certificates, the appellant under
322 the statute of Frauds could not be held liable for the debt of the other organization, because as a matter of law appellant received no consideration therefor as the evidence disclosed except the dues paid to it, it having received none of the assets of either the old corporation or the unincorporated society.

XVII.

The court erred in holding and determining that the agreement of plaintiff at the time he became a member of the Endowment Rank of said old corporation and obtained the certificates of insurance issued to him to conform to and obey the laws, rules, and regulations of the order governing the Endowment Rank then in force, or that might thereafter be enacted, and under the agreement of the appellee, as shown by his certificates that said certificates were conditioned and in consideration of the payment by him thereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all laws governing the Rank then in force, or that might thereafter be enacted, did not authorize the defendant (appellant herein) to increase the rates

in the event it was found necessary so to do in order to enable it to pay the certificates thus issued.

XVIII.

The court erred in its judgment and opinion in this case in holding that the appellant was liable in any event for more than \$3,000.00, the face of the contract for the breach of which damages were sought in this case.

XIX.

The court erred in all that portion of its opinion, and particularly in the fifth sub-division thereof, in holding that the
323 measure of damages, as fixed by the lower court in his peremptory instruction to the jury is a correct one in a case of this character. The said measure of damages being the aggregate amount of all the assessments and dues paid by appellee to said old corporation upon the certificates issued to him in 1879, and upon the certificate issued to him in 1885, together with all the assessments and dues paid to said unincorporated society with interest thereon from respective dates of payment, and together with all dues and assessments paid to this defendant from 1894 to January, 1911, with interest from the date of said payments, aggregating \$3,663.35, for the following reasons, to-wit:

(a) Because under the laws said amounts, or the aggregate of said amounts, is not the legal and proper measure of damages in this case, but an erroneous measure of damages—the correct measure of damages being in this case as determined by the Supreme Court of the United States in a similar case, or in a case involving a similar question—being the value of the certificate of appellee at the time the alleged breach occurred, or the value of the certificate of appellee sued on in this case at the date of the alleged breach of same under all the facts and circumstances, as shown by the evidence in this case.

(b) Because under the law appellee, as shown by the evidence, having surrendered the certificates issued to him in 1879, and in consideration of the surrender and cancellation of same—having received in lieu of them the certificate sued on in this case—could
in no event be entitled to recover the assessments and dues
324 paid to said old corporation upon said surrendered and cancelled certificates, and the court, therefore, necessarily erred in permitting and holding that appellee could recover of this defendant the amount of all of said assessments and dues paid said old corporation upon said surrendered certificates, with interest thereon from the date of payment.

(c) Because the undisputed evidence in this case showing that this defendant received no consideration for any assumption by it of any liability upon the certificate issued by said old corporation, and sued on in this case, either from said old corporation, or from said unincorporated society, and the evidence failing to show that this defendant in any legal way assumed or obligated itself to per-

form the contract sued on in this case, or that this defendant had the power and authority so to do, and the evidence further showing that the only consideration paid, if any, to this defendant for the alleged assumption of liability for the performance of the contract sued on in this case with appellee was the amount of dues and assessments paid to this defendant during, and since the year 1894, plaintiff, or appellee, certainly had no right under the law to recover from this defendant the amount of assessments and dues paid by him either to said old corporation, or said unincorporated society, and unquestionably any recovery against this appellant of which appellee was entitled to recover against appellant at all, should have been limited to the amount of assessments and dues paid this appellant during and since the — 1894, with interest thereon, even if said amount was the correct measure of damages in this case for the breach of said contract,

325 and it should be held that this defendant assumed the performance of appellee's contract sued on, and breached the same.

(d) Because the evidence in this case failing to show that this defendant either issued or assumed the performance of the contract sued on in this case, the court erred in holding this defendant liable in damages for a breach of same.

(e) Because under the undisputed facts of this case, there being no evidence that this defendant was authorized to do, or had contracted in any way binding upon it, to carry out and perform appellee's contract made with said old corporation, and any claim against this defendant being necessarily predicated under the facts of this case upon defendant's implied liability to appellee, such liability was barred by limitation of two years, and the court erred in not so holding.

Remarks.

We do not care to again cite to this motion the numerous authorities upon the various propositions which have already been referred to in our brief. We do, however, desire to again call the court's attention to the fact that beyond any cavil or question this court has committed error in holding, as it did, in its opinion, that appellee could recover from this defendant the amount of all assessments and dues paid by appellee to said old corporation upon the certificates issued to him in 1879, and voluntarily surrendered by him and cancelled in 1885, in consideration of the issuance to him by said old corporation of the certificate in 1885

326 sued on in this case. In holding as it did in its opinion in this case that appellee could recover from appellant said assessments and dues paid on said surrendered certificates, with interest thereon, this court has overruled at least three opinions of the courts of this State on practically this identical question, and also overruled every authority in every State of this Union that has passed upon the question, as well as the conclusions of learned text writers upon the subject of fraternal insurance law.

In the case of *Neely vs. The Supreme Lodge*, reported in 135th S. W., 1046, the court, on page 1051, uses the following language:

"Appellant also assigns as error the conclusion of the court that appellee was entitled to recover the premiums paid on the \$1,000.00 policy. We think that the court erred in this conclusion in any event, for the reason that the \$1,000.00 policy was cancelled by agreement between the parties, and presumably all rights thereunder were adjusted. The fact that the insured is said to have been transferred into a different class does not prevent the \$3,000.00 policy from being a new contract."

In the case of *the Supreme Council v. Garrett*, 85th S. W., p. 27, it was held that the surrender of a \$5,000.00 benefit certificate, and the acceptance of a \$2,000.00 certificate in lieu thereof, created a new contract and released the parties from liability upon the old one. To the same effect is the holding of the court in the case of *Supreme Council vs. Lyon*, reported in 88th S. W., 435, in which case a writ of error was refused by our Supreme Court.

The case of *Allen vs. Crouch*, 115 Tenn., 322, is a decision to the following effect:

327 Where a certificate in a mutual benefit society was surrendered by the member in his lifetime, and another certificate issued in favor of a different beneficiary, the original certificate became *functus officio*.

In Vol. 29 Cyc. of Law, p. 92, and authorities cited in Note 1, the principle is thus stated:

"The issuance of a new certificate in lieu of the original operates as a cancellation of the latter."

To the same effect is the statement of Niblack on Benefit Societies and Accident Insurance, Sec. 219, et seq., p. 418. Also see Sec. 136, p. 272, of the same book and the authorities there cited. The case of *Byrne vs. Casey & Swasey*, 71 Tex., 247, is a decision in our opinion to the same effect. In this case, the certificates issued in 1879 was voluntarily surrendered by the appellee, and in consideration of the cancellation and surrender of same, a new certificate was issued by the old corporation in 1885 to appellee. The contract evidenced by the certificates issued in 1879 was an entirely different contract from the one evidenced by the certificate issued in 1885. The certificates in 1879 were issued upon what is known as a post mortem plan of insurance. There was no limitation in the laws or in the certificate issued thereunder in 1879 in the amount of assessments that could be made, these assessments being levied upon the death of each one of the insured members of the Endowment Rank. Under the certificate issued in 1885, and under the laws then existing, assessments were levied monthly and the fund was provided before the death of the insured members
328 out of which fund the amount of the certificate must be paid on the death of the insured. An entirely new and distinct contract was made under the laws, and certificates issued in 1885 from the contract evidenced by the certificates and laws existing in 1879. No right could possibly have existed against the old corporation under the certificates issued in 1879 after their surrender

and cancellation in 1885 and after the new certificate and new contract evidenced by the certificate issued in 1885 was made. It seems to us under any principle of construction applicable to contracts that this court is clearly in error in holding this defendant liable for the repayment of all the assessments with interest thereon made by and paid to the old corporation under the certificates issued by it to appellee in 1879.

Again, even if it be held that this defendant under its charter granted to it in 1894 assumed liability on the contract made by appellee with the old corporation such assumption of liability by appellant was in law and in effect and in fact a new contract. The only consideration received by appellant for this new contract by which it assumed liability and undertook to perform the old contract made with said old corporation as shown by the evidence was the amount of dues and assessments paid by appellee to this defendant in the year 1894, and since that date. If it can be held in this case that appellant breached this contract which was the only contract by any method of construction that it could be held that appellant made, surely appellant could not be held liable to repay anything more to appellee than the consideration appellant received for this alleged assumption by it. Upon what principle of law, morals, or equity could this appellant be held liable for the payment of the assessments and dues paid by appellee to said old corporation and unincorporated society upon the certificate issued to him in 1885, when the only consideration shown to have been paid to appellant for its alleged assumption of said contract was the assessments and dues paid by appellee to appellant in 1894, and since said time. The undisputed evidence showed that appellant received no consideration from the old corporation or said unincorporated society for making a contract or assumption by it of the contract made by appellee with said old corporation.

XX.

Because the court erred in not holding and determining that the legal and proper measure of damages in this case was the value that appellee's certificate would have had had the rates not been raised in 1910, as complained of by him.

Argument.

The reasonableness of the last assignment of error is apparent. If it be conceded, and it ought to be, that without the raise of rates appellant would have been unable to have paid appellee's certificate, and surely the measure of damages for breaching that certificate ought not to have been in excess of the value of the certificate itself.

To put it differently, let us assume, which is not true, that appellee had his contract with appellant that appellant was without power to collect fees required to meet that contract at maturity, and, therefore, the contract was well-nigh worthless. Now, let us

330 suppose that appellant did an unauthorized act in raising the rates with a view of being able to meet that contract at maturity. Let us further assume that appellee had the right of action for the breach of this contract. Will it be insisted that his measure of damages exceeded the value of his contract? Remember that the value of the contract was merely caused by appellant's inability to collect fees with which to meet it. To hold that appellee had a contract with appellant which appellant had not the power to perform at maturity would be enhanced in value by appellant's recognition of the fact that it could not perform it is a remarkable proposition. This court in rendering this decision has utterly ignored three propositions:

First, that when appellee applied for his certificates he agreed to pay the assessments as required.

Second, that it was impossible to make those certificates of any value without increasing the rates.

Third, that appellee knew when he took the certificates that the rates would probably have to be increased. This he testified to on oath on cross-examination, as the record discloses.

We submit that the measure of damages is most inequitable and cannot be justified on any reasonable hypothesis.

XXI.

Because the court erred in overruling defendant's first assignment of error set out on pp. 29 and 30 of appellant's brief, and found on pp. 142, 143, and 144 of the record, and also based on the twenty-fourth subdivision of defendant's amended motion for a new
331 trial, as is shown in the assignment of error itself on pp. 142, 143 and 144 of the record, which is as follows, to-wit:

"The court erred in giving said peremptory instruction for the following additional reasons, to-wit:

(1) Because the instruction of the court and the verdict of the jury enabled plaintiff to recover more by his wrongful course now than the beneficiary in his policy would have been entitled to, or could have obtained at his death had he proceeded to pay the raised rates.

(j) Because the evidence is wholly insufficient to justify the court in instructing the jury to recover nearly Seven Hundred (\$700.00) Dollars more than the face of the certificate, had the contract been carried out in every particular.

(k) Because, under the charter, constitution and by-laws of the old corporation, and plaintiff's application and certificates made with same, if same was made, and under the constitution and laws of the unincorporated society, and plaintiff's express or implied contract, if any, under the evidence in this case, with said unincorporated society, and particularly under the charter, constitution and by-laws of this defendant corporation, and plaintiff's obligations to it, and its obligations to him, if any, plaintiff was bound, and his contract or claim governed by all laws enacted subsequent to the issuance of his certificate sued on in this case, and adopted by either the old

corporation or unincorporated society, or this defendant, and particularly was plaintiff bound by his rights or claims against defendant governed by the constitution, rules, laws and regulations of this defendant existing at the time it was chartered and subsequent thereto, and hence, plaintiff was not entitled to recover in this case.

(1) Because the court, in the event plaintiff was entitled to recover anything against this defendant, erred in placing the measure of plaintiff's damages at the amount for which he instructed the jury to find for the plaintiff against this defendant, the law applicable to the facts in this case being that in no event could plaintiff recover more than the consideration, with interest thereon, paid by him to this defendant after the date of its incorporation, the said sums so paid being the only consideration, as shown by the evidence, received by this defendant, under any contract, agreement or understanding expressed or implied by which this defendant could be obligated to carry out any contract of insurance plaintiff had either with the old corporation or said unincorporated society, or this defendant.

(m) Because the measure of damages fixed by the court in said peremptory instruction is not the correct measure of damages under the law applicable to the facts in this case, the correct measure being the value of the policy sued on, if the rates had not been increased.

(n) Because under the law applicable to the facts in this case, any claim of plaintiff against this defendant would be and is barred by the statute of limitation of two years.

(o) Because under the law applicable to the facts in this case, the evidence showing that plaintiff surrendered all previous certificates issued to him in the year 1885, and received in lieu thereof the certificate sued on, plaintiff could not recover of defendant any amount paid on said surrendered and cancelled certificates.

This assignment of error is based on the twenty-fourth subdivision of defendant's amended motion for a new trial."

XXII.

Because the court erred in holding in its opinion that the fact that there was no plea of non est facto by the appellant practically admitted the allegation that appellant had assumed the certificate sued on.

Argument.

The court in deciding that point overlooked the statute. It never required any plea of non est facto except defendant was charged with the execution of the instrument. The amended petition in this case plainly charged that appellant did not execute the instrument; that it was executed by the old corporation. It would have been absurd for appellant to have filed a plea of non est facto. There was no charge that there was any written assumption of this certificate or others. But if there had been and under sworn denial it would have devolved upon plaintiff to have proven this written assumption

by producing the instrument upon which it was relied to prove it. A failure of plea of non est facto in a suit on a promissory note does not waive the production of the note. The general denial put that in issue. It must be remembered that this case was tried before the new legislative act went into effect. It was tried under the old rules. We are impressed with the idea that the court would like to modify its statement on that point because our answer instead
 334 of admitting assumption of these certificates, all the way through specifically denied.

XXIII.

Because the court erred in overruling defendant's second assignment of error set out on pp. 56 and 57 of appellant's brief, and found on pp. 140, 141 and 142 of the record, and also based on the twenty-third subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 140, 141 and 142 of the record which is as follows, to-wit:

"The court erred in peremptorily instructing a verdict for plaintiff in the sum of \$3,663.35, as fully shown by peremptory instruction given by the court and the judgment of the court, because the evidence showed conclusively,

(a) That defendant corporation did not issue the obligation sued on ;

(b) That defendant corporation did not assume the obligation sued on ;

(c) That defendant corporation was without power to assume the obligation sued on.

(d) That defendant corporation received no assets of any kind or character, either from the old corporation which expired in 1890, or from the unincorporated society operating for four years previous to the organization of defendant corporation.

(e) That there was no evidence upon which to base an instruction of any kind or character authorizing the jury to find a verdict against defendant corporation for money received and expended by the old corporation from 1879 to 1890 inclusive, with interest
 335 thereon, it being shown as hereinbefore stated that defendant corporation received none of the money thus collected and received no benefit therefrom.

(f) That the evidence wholly fails to authorize any verdict against defendant for any moneys collected by the unincorporated society, because the evidence showed without contradiction that defendant corporation received none of said money, and assumed no obligation to repay same, the only obligation that could have been said to have been assumed would be to carry out the insurance contract with plaintiff for the consideration paid to this defendant, said insurance contract to be considered according to the by-laws of defendant corporation, the only laws that gave the defendant corporation authority to issue insurance certificates, and which said by-laws authorized the defendant corporation to raise and increase rates to any extent that might be necessary to enable it to meet its obligations.

And because all cause of action against the unincorporated society was barred by the statutes of limitation long before the institution of this suit.

(g) That it was impossible to pay the face of plaintiff's certificate with the rates existing before the last raise, of which plaintiff complains, and the evidence further shows that all the certificates of the fourth class were obligations on the membership of the said fourth class, and that plaintiff was as much bound to see that the other members' certificates were paid as they were to see that his was paid, and the fourth class having no funds except such as could be raised by assessments or rates fixed by the organization, it was the only means to which it could resort to enable it to carry out its contracts.

336 (h) That the charge of the court in the face of the evidence last above mentioned was tantamount to declaring that the law required defendant corporation to pay all of its obligations, and yet denied it the power to collect the means by which those obligations could be paid; and because the construction thus placed on said contract permitted plaintiff, after he had ascertained by experience that the rates fixed for his insurance were too low, and after he had ascertained that the only way by which it and others like it could be paid at maturity, was to increase the rates, and then after these rates were increased for that purpose, and a fund thereby accumulated, he would be permitted to withdraw from said class and take more money than he could have obtained by remaining in the insurance department until his death and paying all of his dues.

This assignment of error is based on the twenty-third subdivision of defendant's amended motion for a new trial."

XXIV.

Because the court erred in overruling defendant's third assignment of error set out on p. 63 of appellant's brief, and found on p. 145 of the record, and also based on the twenty-fifth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 145 of the record, which is as follows, to-wit:

"The court erred in overruling defendant's amended motion for a new trial for all the reasons therein stated, and particularly because the evidence was wholly insufficient to justify a peremptory instruction in favor of the plaintiff, and wholly insufficient to support a verdict in favor of plaintiff and against defendant for the following reasons, to-wit:

337 (1) There was no evidence that the old corporation of Knights of Pythias of the World executed the certificate sued on.

(2) There was no evidence that the new corporation created June 1894, assumed the indebtedness of the old corporation which expired in 1890.

(3) Because there is no evidence that the new corporation, defendant herein, is liable by contract or otherwise for the sum of money for which the court instructed the jury to find a verdict against the defendant.

(4) Because if the defendant is liable for anything to the plain-

tiff, it could only be for such sums of money as were paid to it by the plaintiff, and as against most of these payments, if not all, the statute of limitation was a complete defense.

(5) Because under the terms of defendant's charter no recovery could be had by plaintiff in this case.

XXV.

Because the court erred in overruling defendant's fourth assignment of error set out on p. 66 of appellant's brief, and found on p. 130 of the record, and also based on the fourth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 130 of the record, which is as follows, to-wit:

338 "The court erred in permitting the plaintiff to read in evidence the two certificates, one being in the first class, and the other in the second class, both of date April 30, 1879, issued by the corporation which was created in 1870, and expired by its terms in 1890, because they were not charged to have been issued by the defendant, and their execution was not proven, nor was it shown that the defendant corporation had assumed the obligations thereby imposed; and because no corporation can assume the debts of a previous corporation without authority of law for so doing, and there was nothing in the act creating defendant corporation that authorized it to assume the debts of the previous corporation, and because it was further shown that these old certificates in 1879 were surrendered by voluntary agreement of the parties as shown by the pleadings, and new certificate in lieu thereof issued in 1885, and that all rights under the old certificates were absolutely destroyed by the agreement to cancel same and accept a new certificate in their stead; all of which is more fully shown by bill of exception No. "4".

This assignment of error is based on the fourth subdivision of defendant's amended motion for a new trial."

XXVI.

Because the court erred in overruling defendant's fifth assignment of error set out on p. 69 of appellant's brief, and found on p. 131 of the record, and also based on the fifth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 131 of the record, which is as follows, to-wit:

339 "The court erred in permitting the plaintiff to read in evidence certificate No. 4183, issued May 29th, 1885, for the reason that it was purported to have been issued by the corporation created in 1870, and which expired by its own limitation in 1890, and because it was not charged to have been issued by the defendant corporation, and because it had not been proven that its liability thereby imposed had been assumed by the defendant corporation, nor was it shown that defendant corporation had the authority to assume same, and because the execution of said certificate purported to have been issued May 29th, 1885, (it being the one upon which

this suit is based) had not been proven, and because the plaintiff has not offered in connection therewith the written obligation upon which the latter certificate was issued, all of which is more fully shown by bill of exception No. "5".

This assignment of error is based on the fifth subdivision of defendant's amended motion for a new trial."

XXVII.

Because the court erred in overruling defendant's sixth assignment of error set out on p. 76 of appellant's brief, and found on pp. 131 and 132 of the record, and also based on the sixth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 131 and 132 of the record, which is as follows, to-wit:

"The court erred in permitting the plaintiff to introduce from the answer to cross-interrogatory No. 29 of the witness, W. O. Powers, alleged copies of the laws of 1880, passed by the old corporation known as Knights of Pythias of the World, because same had not been proven to be the laws of the old Knights of Pythias corporation, and because they were utterly immaterial, as it was not shown
340 that defendant corporation had assumed any obligation thereof, inasmuch as it was not created until fourteen years after the passage of said laws, all of which is more fully shown by reference to bill of exception No. 6.

This assignment of error is based on the sixth subdivision of defendant's amended motion for a new trial.

XXVIII.

Because the court erred in overruling defendant's seventh assignment of error set out on pp. 77 and 78 of appellant's brief, and found on p. 133 of the record, and also based on the eleventh subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 133 of the record, which is as follows, to-wit:

"The court erred in permitting the plaintiff's counsel on cross-examination to prove by the witness, Powers, that many persons left the fourth class, of which plaintiff was a member, and joined what is known as the fifth class, and that thereby the membership of the fourth class was reduced, because that afforded no ground for a cause of action against defendant; all of which is fully shown by bill of exception No. 11.

This assignment of error is based on the eleventh subdivision of defendant's amended motion for a new trial."

XXIX.

Because the court erred in overruling defendant's eighth assignment of error set out on p. 78 of appellant's brief, and found on pp.

133 and 134 of the record, and also based on the twelfth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 133 and 134 of the record, which is as follows, to-wit:

"The court erred in permitting plaintiff to prove by the witness, Powers, by parol the contents of the books of defendant corporation by undertaking to show and showing that the fifth class of the insurance order, organized after the fourth class, had accumulated a surplus of about Three Million Dollars, because said testimony was wholly immaterial, it being shown that plaintiff contributed nothing to that fund, and refused even to contribute anything to the fourth class fund, of which he seeks by this suit to be a beneficiary; all of which is fully shown by bill of exception No. 12.

This assignment of error is based on the twelfth subdivision of defendant's amended motion for a new trial."

XXX.

Because the court erred in overruling defendant's ninth assignment of error set out on p. 78 of appellant's brief, and found on p. 134 of the record, and also based on the thirteenth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 134 of the record, which is as follows, to-wit:

"The court erred, after the defendant closed its testimony, in permitting plaintiff to offer depositions, as to the condition of the finances of the fifth class, it being a class to which plaintiff did not belong, and to which fund he contributed nothing, it being fully

shown that the Order at the time plaintiff entered it permitted the creation of different insurance classes, and his certificate showed that he had first taken one in the first and second classes, and later transferred both to the fourth class; all of which is fully shown by bill of exception No. 13.

This assignment of error is based on the thirteenth subdivision of defendant's amended motion for a new trial."

XXXI.

Because the court erred in overruling defendant's tenth assignment of error set out on p. 85 of appellant's brief, and found on pp. 134 and 135 of the record, and also based on the fourteenth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 134 and 135 of the record, which is as follows, to-wit:

"The court erred in refusing special charge No. 1 asked by defendant, which was in words and figures, substantially, as follows:

'You are instructed that the certificate sued on is alleged to have been issued and executed by the Knights of Pythias of the World, a corporation which expired in 1890, and that there is no proof that the defendant corporation assumed its payments. You will, therefore, find for the defendant.'

This assignment of error is based on the fourteenth subdivision of defendant's amended motion for a new trial."

343

XXXII.

Because the court erred in overruling defendant's eleventh assignment of error set out on p. 86 of appellant's brief, and found on p. 135 of the record, and also based on the fifteenth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on p. 135 of the record, which is as follows, to-wit:

"The court erred in refusing special charge No. "2" asked by the defendant, which is in substance as follows: 'In the event special charge No. "1" shall be refused, defendant asks the following:

You are instructed that there is no evidence that the old corporation which expired in 1890 executed the certificate sued on. No proof has been offered upon that point. You will, therefore, find for the defendant.'

This assignment of error is based on the fifteenth subdivision of defendant's amended motion for a new trial."

XXXIII.

Because the court erred in overruling defendant's twelfth assignment of error set out on pp. 86 and 87 of appellant's brief, and found on pp. 135 and 136 of the record, and also based on the seventeenth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 135 and 136 of the record, which is as follows, to-wit:

"The court erred in refusing special charge No. "4", asked by the defendant, which was in words and figures as follows:

344 'In the event special charges Nos. 1, 2, and 3 shall be refused, defendant asks the following instruction:

Gentlemen of the Jury: You are instructed that the by-laws of the defendant authorize it to raise the rates of the members in its insurance department, and in the fourth class, should it become necessary to pay the death losses that may occur. You are instructed that if you believe from the evidence that it was necessary for the defendant to raise the rates in 1910 in order to be able to meet its obligations, that is to say, to pay the death losses when they mature, and if you believe that the amount of the raised rates was only reasonably necessary for that purpose, you will find for the defendant.'

This assignment of error is based on the seventeenth subdivision of defendant's amended motion for a new trial."

XXXIV.

Because the court erred in overruling defendant's thirteenth assignment of error set out on p. 88 of appellant's brief, and found on pp. 136 and 137 of the record, and also based on the eighteenth subdivision of defendant's amended motion for a new trial, and is shown in the assignment of error itself on pp. 136 and 137 of the record, which is as follows, to-wit:

"The court erred in refusing special charge No. "5" asked by the defendant, which was substantially as follows:

345 'In the event that the first three special charges shall be refused, defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each other's lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay those certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant.'

This assignment of error is based on the eighteenth subdivision of defendant's amended motion for a new trial."

XXXV.

Because the court erred in overruling defendant's fourteenth assignment of error, set out on pp. 88 and 89 of appellant's brief, and found on p. 137 of the record, and also based on the nineteenth subdivision of defendant's amended motion for a new trial, as is shown in the assignment of error itself on pp. 137 of the record, which is as follows, to-wit:

"The court erred in refusing special charge No. "6" asked by defendant, which was substantially as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

346 GENTLEMEN OF THE JURY: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules, and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution, and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution, and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations to the members of the fourth class, then you are instructed to find for the defendant.'

This assignment of error is based on the nineteenth subdivision of defendant's amended motion for a new trial."

Appellant would further show that appellee's attorneys of record are Messrs. Cockrell, Gray & McBride, a firm, each of whose members reside in the City and County of Dallas, State of Texas, with offices in the City of Dallas and State of Texas, and Thomas F. West, Esq., who resides in the City of Ft. Worth, Tarrant County, Texas, upon each or either of whom service of this motion may be had. Appellant prays that service of this motion may be had

upon said attorneys, and that upon a final hearing hereof judgment of affirmance heretofore entered be set aside, and that this case be reversed and rendered, or reversed and either a judgment be rendered in this court in favor of the appellant, or that the same be remanded with instructions so that the case may be tried in the court below according to law.

CRANE & CRANE,
H. P. BROWN,

*Attorneys for Appellant, Supreme Lodge
Knights of Pythias.*

Having received a copy hereof from appellant's counsel we hereby waive service and agree that this memorandum may be a complete substitute therefor.

March 27, 1914.

THOS. F. WEST,
COCKRELL, GRAY & McBRIDE,
Att'y's for Appellee.

Filed in Court of Civil Appeals Mar. 27, 1914, Geo. W. Blair,
Clerk 5th District.

Filed in Supreme Court Jul- 2, 1914, F. T. Connerly, Clerk.

On Motion for Rehearing.

No. 6997.

SUPREME KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

Opinion on Rehearing.

Upon a re-consideration of this case, on appellant's motion for a rehearing, we conclude that the court erred in affirming the judgment of the trial court in awarding appellee, Mims, a recovery for the amount of the payments made upon the certificates, or contracts of insurance, issued to him in 1879, but which were surrendered for the new certificate, or contract, issued in 1885. An ingenuous argument is made by counsel for appellee in support of their theory that it was not the intention of appellee and the old corporation that the rights of the parties under the certificates of 1879 should be surrendered upon the acceptance by appellee of the certificate issued in 1885, and that such surrender could not take place and a new contract created unless there was an actual performance and not merely the promise to perform the agreement contained in the new certificate, but it is not believed the contention is sound, at least not so under the facts of this case. The application of appellee to enter the fourth class and to receive the certificate issued to him in that class in 1885 in lieu of certificates

issued in 1879, in the first class contained the following: "The undersigned, born on the 6th day of June, 1837, a member in good standing of Sec. No. 278, Endowment Rank K. of P. and holding certificate No. 5383 in 1st class which is hereto attached, hereby makes application to enter the fourth class, in which I desire to hold an endowment of One Thousand Dollars, and I hereby surrender all my right, title and interest in and to the within certificate the benefit upon my death to be paid as follows: To my wife, Mary J. Mims." A like application was made when appellee surrendered his certificate for two thousand dollars in the second class. The certificate appellee received in 1885, in lieu of the certificates mentioned above and which is sued on in this case, contains, among others, the following stipulation: "In consideration of the absolute surrender of the certificates heretofore

349 held by him in first and second classes, for cancellation as requested in his application, for transfer to the fourth class bearing date of May 7, 1885, and in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, nor in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge of Knights of Pythias of the World to Mary J. Mims, as directed by said brother in his application." These stipulations show, we think, that appellee agreed to surrender and to have canceled his certificate in the first and second class in consideration of the issuance to him of the certificate in the fourth class, the acceptance of which operated, in the absence of evidence to the contrary, as a discharge and satisfaction of the former certificates of 1879, and an adjustment of all rights thereunder. *Supreme Lodge Knights of Pythias vs. Neeley*, 135 S. W., 1046. It follows that appellee was not entitled to recover the premiums or assessments paid on the certificates, issued to him in 1879, and the judgment rendered in his favor of the amount of said assessments and the interest thereon is erroneous and must be set aside.

We believe the other questions arising on the appeal have been correctly decided. The recent case of *Provident Savings Life Assurance Society v. Ellinger*, reported in 164 S. W., 1024, is 350 not, under the facts of this case, authority for appellant's contention that the amount of the premiums or assessments paid by appellee, with interest thereon, is not appellee's measure of damages. The record, without contradiction, in the case before us shows that appellee was not re-insurable at the time of the breach of the contract sued on, while in the *Ellinger* case it showed that he was. This is an important distinction differentiating the cases with respect to the rule of damages. *Washington Life Ins. Co. v. Lovejoy*, 149 S. W., 398. This distinction seems to be recognized in both the *Ellinger* case and the *Neeley* case, *supra*. That appellee, Mims, was seventy-four years of age and uninsurable at the time of the breach of his contract was pleaded and proved and the fact stands unchallenged by anything appearing in the record sent to this court. Appellee is, therefore, entitled to recover only

the amount of premiums paid since the issuance to him of the certificate in 1885, with interest, and the judgment of the trial court and the judgment of this court heretofore rendered affirming the judgment of the trial court, will be reformed so as to deduct therefrom the amount of premiums and interest paid on the insurance contracts of 1879. The principal amount of the premiums paid on these contracts, as appears without dispute from the record, is \$201.00, and while these payments were in all probability made monthly, yet the record does not affirmatively show that fact. The certificates of 1879 were issued on the 30th day of April of that year and the date of the judgment of the district court is March 14th, 1913, a period of little less than thirty-four years. The
351 rate of interest recoverable and allowed appellee is six per cent per annum, and he agrees in writing in this court that in the event we hold he is not entitled to recover the premiums paid on the 1879 contracts, to remit all interest recovered by him in the lower court on said premiums, which amounts to \$410.00, and which added to the \$201.00, principal, makes \$611.00. It is therefore ordered that the judgment of the district court and the judgment of this court heretofore rendered at this term, affirming said judgment of the district court, be reformed so as to deduct from said judgments the sum of \$611.00, and that the judgment of the district court as reformed stand affirmed; that appellant's motion for a rehearing in all other respects be overruled, and that the costs of this appeal be taxed against appellee.

Talbot, Associate Justice.

Delivered May 30th, 1914.

Filed in Court of Civil Appeals May 30, 1914, Geo. W. Blair,
Clerk 5th District.

Filed in Supreme Court Jul- 2, 1914, F. T. Connerly, Clerk.

Saturday, May 3th, 1914.

6348-6997.

SUPREME —, KNIGHTS OF PYTHIAS,

VS:

S. MIMS.

Order Granting Motion in Part.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the motion be granted in part.

352 From District Court Dallas County, Saturday May 30th, 1914.

6997.

SUPREME LODGE, KNIGHTS OF PYTHIAS,

vs.

S. MIMS.

Judgment of Ct. Civil Appeals, Reforming its Judgment.

Opinion of the Court delivered by Mr. Talbot, Associate Justice.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of this court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court be and is now here reformed so as to deduct therefrom the sum of Six Hundred and Eleven Dollars, and the judgment as so reformed be in all other respects affirmed; that the appellee, S. Mims, do have and recover of appellant, Supreme Lodge, Knights of Pythias, and National Surety Company, its surety upon appeal bond, the sum of Three Thousand and Fifty Two and 35/100 Dollars, being amount adjudged below, less said sum of Six Hundred and Eleven Dollars, and all costs accrued in the court below. It is further ordered that appellee, S. Mims, pay all costs of this appeal and this decision be certified below for observance.

In Supreme Court of Texas. From Dallas County, Fifth District.

December 9th, 1914.

SUPREME LODGE, KNIGHTS OF PYTHIAS,

vs.

S. MIMS.

Order of Supreme Court.

This day has come on to be heard the application of Supreme Lodge Knights of Pythias for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said applicant be refused. That
353 the applicant Supreme Lodge Knights of Pythias and its surety, National Surety Co. pay all costs incurred on this application. Mr. Justice Hawkins dissents.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and seal of said Court, this the 31 day of Dec.
A. D. 1914.

[SEAL.]

F. T. CONNERLY, *Clerk.*
By H. L. CAMP, *Deputy.*

Application No. 8937.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
 vs.
 S. MIMS.

Copy of Judgment in Supreme Court.

Application for writ of error refused.

Filed in Court of Civil Appeals Jan. 2, 1915, Geo. W. Blar, Clerk
5th District.354 In the Court of Civil Appeals for the Fifth Supreme Judicial
District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
 vs.
 S. MIMS, Appellee.

*Petition for Writ of Error from the Supreme Court of the United
 States to the Honorable Court of Civil Appeals for the Fifth Su-
 preme Judicial District of Texas:*

Petition for Writ of Error from Supreme Court of U. S. to Court
 Civil Appeals.

To the Honorable Anson Rainey, Chief Justice of Honorable Court
 of Civil Appeals for the Fifth Supreme Judicial District of Texas:

Now comes Supreme Lodge, Knights of Pythias, by its attorneys,
 and complains and alleges that it is a citizen of the United States
 of America; that it was incorporated by special act of Congress of
 the United States, which was approved by the President on June
 29th, 1894; that on the 19th day of May, A. D. 1911, S. Mims
 filed a suit against your petitioner in the District Court of Dallas
 County, Texas, for the 44th Judicial District of Texas, in which
 suit he alleged that a corporation other than your petitioner, called
 Supreme Lodge, Knights of Pythias, or Supreme Lodge, Knights
 of Pythias of the World, organized under an act of the Congress
 of the United States, and approved by the President in 1870, and
 which by the express terms of the act authorizing its creation, ex-
 pired twenty years thereafter, that is to say on or about May 5th,

1870, issued to him a policy in 1885, for the sum of Three
 355 Thousand Dollars, insuring his life for the benefit of his
 wife, Mrs. Mary J. Mims; that he continued to carry said
 policy in said corporation of which he was a member until the said
 corporation expired in 1890; that thereafter an unincorporated or-
 ganization by the same name, to-wit, Supreme Lodge, Knights of
 Pythias, or Supreme Lodge, Knights of Pythias of the World, con-
 tinued the insurance business, and that he became a member of it,
 paying his premiums thereto for the period of its existence, to-wit,
 about four years; that thereafter on June 29th, 1894, your petitioner

was created; that is to say, was incorporated by special act of the Congress of the United States, and approved by the President on said date; that by the express terms of the act of incorporation of your petitioner it assumed the liabilities of the old corporation that had issued plaintiff's policy, including his policy, and that he was a member of petition corporation; that at the date of the issuance of the policy described in his petition it was agreed by and between him and the old corporation that the premiums on his policy should be paid monthly; that the premiums or assessments should not exceed the sum of \$3.60 per month; that the premiums were increased up to \$7.35 per month, which he paid, and that he continued to pay those increased premiums to your petitioner from the 29th of June, 1894, until August, 1910, at which time your petitioner by a pretended law or amended law increased the rates or assessments to the sum of \$34.80 per month; that your petitioner claimed that the right to thus increase the rates was conferred on it by its charter,

356 to-wit, the act of the Congress aforesaid, but that said act of the Congress referred no such right, privilege or power upon your petitioner; that the unauthorized increase in rates on said date constituted a repudiation and breach of his contract made with the old corporation, and assumed by the new corporation, and entitled him to recover from your petitioner all of the sums of money paid by him as assessments and premiums to the old corporation, the unincorporated society, and the new corporation, for which he prayed a judgment, to-wit, the sum of \$1,950.00, with six per cent interest thereon from the dates of the several payments.

Your petitioner answered in said cause denying all of the allegations in the petition, and specially denying that by the terms of its charter it had assumed the obligations of the old corporation, including the demand sued upon by plaintiff; that your petitioner was a fraternal insurance organization issuing policies only to its members who promised to obey all the existing laws, and those that should thereafter be passed; that it was without power to issue policies to other than its members; that it operated not for profit, but for the benefit of its membership; that by the express terms of its charter it had authority to increase the rates or assessments charged its membership for policies as should become reasonably necessary to enable it to meet its obligations thereby imposed; that it became necessary for it to increase its rates to \$34.80 per month, in order to enable it to meet its obligations aforesaid, and that it increased them for that reason only, by virtue of the power conferred upon it by its charter; that the old corporation issuing said cer-

357 tificates had like powers.

The cause came on for trial in said court on the 11th day of March, A. D. 1913, and resulted in a peremptory instruction by the trial judge to the jury to find a verdict against the defendant, your petitioner herein, for the sum of \$3,663.35, which was rendered, and judgment thereon entered for said amount, together with all costs of suit.

The Court in giving said instruction erroneously decided all the Federal questions against your petitioner, to-wit:

(1) That your petitioner by the act of its incorporation assumed the obligations of the old corporation, including the demand sued upon by plaintiff.

(2) That its charter conferred no power on it to increase its rates, even though necessary to meet its liabilities imposed by the certificates issued.

(3) That said increase constituted a breach of its contract, and entitled plaintiff to recover all of the several sums of money paid by him as assessments or premiums to the old corporation, the unincorporated society, and to your petitioner.

(4) That the old corporation had no power to increase plaintiff's assessments.

Because your petitioner avers that there were no other sufficient or adequate grounds upon which to base said judgment.

Thereupon your petitioner by further proceedings seasonably had, removed said cause by appeal to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, at Dallas, which said court after full hearing of all the issues involved in said cause, reduced the amount of said judgment to three
358 thousand fifty two 35/100 Dollars, but as thus reformed, affirmed the judgment of the District Court in all things for all sums of money paid by said Mims to the old corporation since 1885, and for all sums that he paid the unincorporated society after the death of the old corporation, and for all sums paid by him, to your petitioner, and expressly determined that your petitioner by the terms of its charter assumed all the contracts and obligations of the old corporation, including that of the said Mims, and that the re-rating of appellee, Mims, or the raising of the rates and assessments by the act of your petitioner in 1910 was unauthorized by its charter, and constituted such a repudiation or breach of its insurance contract as entitled him, the said Mims, to recover the sums paid upon it; and that this was true, notwithstanding the agreement made by the plaintiff in his application for the certificate described in his pleadings, that his policy was conditioned upon his payment to the endowment rank (meaning the insurance department of your petitioner) all monthly payments as required, and a full compliance by him with all the laws governing the rank then in force or that might thereafter be enacted, and it denied to your petitioner the right to increase the rates or assessments to any extent whatever.

Thereupon your petitioner seasonably applied in the usual form to the Supreme Court of the State of Texas for a writ of error in order to have the judgment of the said Honorable Court of Civil Appeals for the Fifth Supreme Judicial District reviewed, and the aforesaid errors therein corrected, but the Supreme Court of the State of
359 Texas, on the 31st day of December, A. D. 1914, refused said application of your petitioner, and refused to review or correct the errors aforesaid, but returned the record in said cause to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, as by the rules of said Supreme Court and laws of said State of Texas, it was required to do upon refusing the writ of error.

Wherefore, your petitioner shows that the said judgment of the said Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas was and is a final judgment of the highest court of the said State of Texas, in which a decision in said suit could or can be had.

Your petitioner further avers that several Federal questions were made in said cause, to-wit:

(1) That it was claimed by plaintiff in his petition that the act of the Congress of the United States of America, incorporating your petitioner, imposed upon your petitioner the obligation to assume the debts and liabilities of the old corporation issuing the certificate involved in this suit, whose life expired in 1890.

(2) That under the terms of your petitioner's charter, it had not the power it claimed and set up to pass by-laws increasing the rates of assessments which it demanded of plaintiff as a condition precedent to continuing his insurance.

(3) That the increase in rates which your petitioner made, claiming the power under authority of its Federal charter, constituted a breach of the contract sued on, and justified the said Honorable Court of Civil Appeals in rendering the judgment against
360 your petitioner, for the said sum of \$3,052.35, being all the amounts of the several payments and assessments made on said certificate to the old corporation, the unincorporated society, and your petitioner, and decided the further Federal question suggested by its answer, as well as impliedly included in plaintiff's petition, that it, your petitioner, had authority under its charter to insure persons, members of its organization who refused to obey its laws properly passed governing the endowment rank, of which they were a member.

Your petitioner further avers that there were no other sufficient or adequate grounds upon which to base said judgment.

Wherefore, your petitioner avers that by the judgment of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, it was denied the powers, right and privileges conferred on it by the statute of the United States which constituted its charter, and which was specially set up and claimed by it in the said cause.

Wherefore, your petitioner prays for an allowance of writ of error from the Supreme Court of the United States to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and your petitioner will ever pray.

Respectfully submitted,

SUPREME LODGE, KNIGHTS
OF PYTHIAS, *Petitioner*,

By J. P. GOODRICH,

M. M. CRANE,

H. P. BROWN, *Its Attorneys*.

The writ of error as prayed for in the foregoing petition is hereby allowed this 9th day of January, A. D. 1915, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Sixty Five Hundred (\$6500.00) Dollars. Dated at Dallas, Texas, this 9th day of January, A. D. 1915.

ANSON RAINEY,
Chief Justice, Honorable Court of Civil Appeals for Fifth Supreme Judicial District of Texas.

In the Supreme Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

Assignment of Errors.

Supreme Lodge, Knights of Pythias, in connection with petition for writ of error herein, makes the following assignments of error, which it avers on the final order and judgment herein, dated the 30th day of May, A. D. 1914:

I.

The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not ones of exclusive Federal jurisprudence, 362 and making it incumbent upon that Court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said Court erred in holding and determining in said case that by the terms of the Charter of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance upon which said Mims' suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said Court erred in holding and determining that the re-rating of appellee, that is to say the raising of the monthly assessments to the sum of \$34.80 per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said Court erred in holding and determining in its said opinion that the re-rating or raising of the monthly assessments to the sum

of \$34.80 constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said Court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

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VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have authority to re-rate or raise said assessments above the amount of \$3.60 per month.

VII.

The said Court erred in not holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The Court erred in not holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said Court erred in rendering a judgment against your petitioner for any sum whatever.

SUPREME LODGE, KNIGHTS OF
PYTHIAS, *Petitioner*,

By J. P. GOODRICH,
H. P. BROWN,
M. M. CRANE,

Its Attorneys.

364 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,

vs.

S. MIMS, Appellee.

Order Allowing Writ of Error and Approving Bond.

The above and entitled matter coming on to be heard upon the petition of Appellant therein, for writ of error from the Supreme Court of the United States to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, and upon examination of said petition and the record in said matter, and desiring to give petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and the bond presented by said petitioner be and the same is hereby approved.

ANSON RAINEY,
Chief Justice.

In the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas at Dallas.

Writ of Error.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,

vs.

S. MIMS, Appellee.

UNITED STATES OF AMERICA, *ss*:

365 The President of the United States to the Honorable the Judges of the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas at Dallas, Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment in the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas at Dallas, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit, between Supreme Lodge, Knights of Pythias, defendant and plaintiff in error, and S. Mims, plaintiff and defendant in error, wherein was drawn in question the construction of a clause of a statute of the United States, and the decision was against the right, title and privilege specially set up and claimed under said clause of said statute, a manifest error hath happened, to the great damage of the said Supreme Lodge, Knights of Pythias, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 8th day of February next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein, to correct that error, what of right
 366 and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward O. White, Chief Justice of the Supreme Court of the United States, the 11th day of January, 1915.
 (S.)

LOUIS C. MAYNARD,
*Clerk of the United States District Court for
 the Northern District of Texas at Dallas.*

In the Court of Civil Appeals for the Fifth Supreme Judicial District
 of the State of Texas at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
 vs.
 S. MIMS, Appellee.

Bond.

Know all Men by these Presents, that we, Supreme Lodge, Knights of Pythias, a corporation, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto S. Mims, in the sum of Six Thousand Five Hundred (\$6500.00) Dollars, to be paid to the said obligee, his successors, representatives, and assigns; to the payment of which, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of January, A. D. 1915.

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of
 Texas.

367 Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SUPREME LODGE, KNIGHTS OF
 PYTHIAS,
 (S.) By H. P. BROWN,
Its Agent and Attorney in Fact.
 AMERICAN SURETY COMPANY
 OF NEW YORK,
 By G. G. SHEERIN, *Att'y in Fact.*

THE STATE OF TEXAS,
County of Dallas:

On this the 9th day of January, A. D. 1915, before me personally appeared H. P. Brown, known to me to be the person who, as agent and attorney in fact for Supreme Lodge, Knights of Pythias, sign the name of said Supreme Lodge, Knights of Pythias to the above and foregoing bond, and who being by me duly sworn, deposes and says that he is agent and attorney in fact of said Supreme Lodge, Knights of Pythias, and that he had and has authority to execute the above bond as agent and attorney in fact.

H. P. BROWN.

Subscribed and sworn to before me this 9th day of January, A. D. 1915.

N. M. COOK,
Notary Public, Dallas County, Texas.

THE STATE OF TEXAS,
County of Dallas:

On this the 9th day of January, A. D. 1915, personally appeared before me G. G. Sheerin, who being by me duly sworn, deposes and says that he is agent of American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed 368 and sealed on behalf of said corporation by authority conferred upon him by said corporation as its agent, and the said G. G. Sheerin acknowledged said instrument to be the free act and deed of said corporation.

G. G. SHEERIN.

Subscribed and sworn to before me this 9th day of January, A. D. 1915.

(S.)

A. F. ALLEN,
Notary Public, Dallas County, Texas.

I hereby approve the foregoing bond and surety, this 9th day of January, A. D. 1915.

ANSON RAINEY,
*Chief Justice Court of Civil Appeals for
the Fifth Supreme Judicial District of
the State of Texas.*

In the Court of Civil Appeals for the Fifth Supreme Judicial District
of Texas at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. Mims, Appellee.

Citation.

UNITED STATES OF AMERICA, ss:

To S. Mims, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, wherein Supreme Lodge, Knights of Pythias in plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioneed, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Anson Rainey, Chief Justice of Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, this 9th day of January, A. D. 1915.

ANSON RAINEY,
*Chief Justice Court of Civil Appeals for
the Fifth Supreme Judicial District of the
State of Texas.*

Copy of the within citation received this — day of —, A. D. 1915, and service thereof accepted.

Attorney for S. Mims.

I hereby certify that on the 15th day of January, 1915, that I delivered to L. C. McBride Esq. Attorney for Appellee S. Mims, in person, a certified copy of this citation.

W. K. REYNOLDS,
Sheriff Dallas County, Tex.
By W. S. THOMPSON,
Deputy.

370 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

Petition for Writ of Error from the Supreme Court of the United States to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas:

To the Honorable Anson Rainey, Chief Justice of Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas:

Now comes Supreme Lodge, Knights of Pythias, by its attorneys, and complains and alleges that it is a citizen of the United States of America; that it was incorporated by special act of the Congress of the United States, which was approved by the President on June 29th, 1894; that on the 19th day of May, A. D., 1911, S. Mims filed a suit against your petitioner in the District Court of Dallas County,

371 Texas, for the 44th Judicial District of Texas, in which he alleged that a corporation other than your petitioner, called Supreme Lodge, Knights of Pythias, or Supreme Lodge, Knights of Pythias of the World, organized under an act of the Congress of the United States, and approved by the President in 1870, and which by the express terms of the act authorizing its creation, expired twenty years thereafter, that is to say on or about May 5th, 1870, issued to him a policy in 1885, for the sum of Three Thousand Dollars, insuring his life for the benefit of his wife, Mrs. Mary J. Mims; that he continued to carry said policy in said corporation of which he was a member until the said corporation expired in 1890; that thereafter an unincorporated organization by the same name, to-wit, Supreme Lodge, Knights of Pythias, or Supreme Lodge, Knights of Pythias of the World, continued the insurance business, and that he became a member of it, paying his premiums thereto for the period of its existence, to-wit, about four years; that thereafter on June 29th, 1894, your petitioner was created; that is to say, was incorporated by special act of the Congress of the United States, and approved by the President on said date; that by the express terms of the act of incorporation of your petitioner it assumed the liabilities of the old corporation that had issued plaintiff's policy, including his policy, and that he was a member of petitioner corporation; that at the date of the issuance of the policy described in his petition it was agreed by and between him and the old corporation that the premiums on his policy should be paid monthly; that the premiums or assessments should not exceed the sum of \$3.60 per month; that the premiums were increased up to

372 \$7.35 per month, which he paid, and that he continued to pay those increased premiums to your petitioner from the 29th of June, 1894, until August, 1910, at which time your petitioner by a pretended law or amended law increased the rates

or assessments to the sum of \$34.80 per month; that your petitioner claimed that the right to thus increase the rates was conferred on it by its charter, to-wit, the act of the Congress aforesaid, but that said act of the Congress conferred no such right, privilege or power upon your petitioner; that the unauthorized increase in rates on said date constituted a repudiation and breach of his contract made with the old corporation, and assumed by the new corporation, and entitled him to recover from your petitioner all of the sums of money paid by him as assessments and premiums to the old corporation, the unincorporated society, and the new corporation, for which he prayed a judgment, to-wit, the sum of \$1,950.00, with six per cent interest thereon from the dates of the several payments.

Your petitioner answered in said cause denying all of the allegations in the petition, and specially denying that by the terms of its charter it had assumed the obligations of the old corporation, including the demand sued upon by plaintiff; that your petitioner was a fraternal insurance organization issuing policies only to its members who promised to obey all the existing laws, and those that should thereafter be passed; that it was without power to issue policies to other than its members; that it operated not for profit, but for the benefit of its membership; that by the express terms of its charter it had authority to increase the rates or assessments charged
373 its membership for policies as should become reasonably necessary to enable it to meet its obligations thereby imposed; that it became necessary for it to increase its rates to \$34.80 per month, in order to enable it to meet its obligations aforesaid, and that it increased them for that reason only, by virtue of the power conferred upon it by its charter; that the old corporation issuing said certificate had like powers.

The cause came on for trial in said court on the 11th day of March, A. D. 1913, and resulted in a peremptory instruction by the trial judge to the jury to find a verdict against the defendant, your petitioner herein, for the sum of \$3,663.35, which was rendered, and judgment thereon entered for said amount, together with all costs of suit.

The Court in giving said instruction erroneously decided all the Federal questions against your petitioner, to-wit:

(1) That your petitioner by the act of its incorporation assumed the obligations of the old corporation, including the demand sued upon by plaintiff,

(2) That its charter conferred no power on it to increase its rates, even though necessary to meet its liabilities imposed by the certificates issued,

(3) That said increase constituted a breach of its contract, and entitled plaintiff to recover all of the several sums of money paid by him as assessments or premiums to the old corporation, the unincorporated society, and to your petitioner.

374 (4) That the old corporation had no power to increase plaintiff's assessments.

Because your petitioner avers that there were no other sufficient or adequate grounds upon which to base said judgment.

Thereupon your petitioner by further proceedings seasonably had, removed said cause by appeal to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, at Dallas, which said Court after full hearing of all the issues involved in said cause, reduced the amount of said judgment to three thousand fifty two 35/100 dollars, but as thus reformed, affirmed the judgment of the District Court in all things for all sums of money paid by Mims to the old corporation since 1885, and for all sums that he paid the unincorporated society after the death of the old corporation, and for all sums paid by him, to your petitioner, and expressly determined that your petitioner by the terms of its charter assumed all the contracts and obligations of the old corporation, including that of the said Mims, and that the re-rating of appellee, Mims, or the raising of the rates and assessments by the act of your petitioner in 1910 was unauthorized by its charter, and constituted such a repudiation or breach of its insurance contract as entitled him, the said Mims, to recover the sums paid upon it; and that this was true, notwithstanding the agreement made by the plaintiff in his application for the certificate described in his pleadings, that his policy was conditioned upon his payment to the Endowment Rank (meaning the insurance department of your petitioner) all monthly payments as required, and a full compliance by him with all the laws governing the Rank then in force

375 or that might thereafter be enacted, and it denied to your petitioner the right to increase the rates or assessments to any extent whatever.

Thereupon your petitioner seasonably applied in the usual form to the Supreme Court of the State of Texas for a writ of error in order to have the judgment of the said Honorable Court of Civil Appeals for the Fifth Supreme Judicial District reviewed, and the aforesaid errors therein corrected, but the Supreme Court of the State of Texas, on the 31st day of December, A. D. 1914, refused said application of your petitioner, and refused to review or correct the errors aforesaid, but returned the record in said cause to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, as by the rules of said Supreme Court and laws of said State of Texas, it was required to do upon refusing the writ of error.

Wherefore, your petitioner shows that the said judgment of the said Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas was and is a final judgment of the highest court of the said State of Texas, in which a decision in said suit could or can be had.

Your petitioner further avers that several Federal questions were made in said cause, to-wit:

- (1) That it was claimed by plaintiff in his petition that the act of the Congress of the United States of America, incorporating your petitioner, imposed upon your petitioner the obligation to assume the debts and liabilities of the old corporation issuing the certificate involved in this suit, whose life expired in 1890.

376 (2) That under the terms of your petitioner's charter, it had not the power it claimed and set up to pass by-laws increasing the rates of assessments which it demanded of plaintiff as a condition precedent to continuing his insurance.

(3) That the increase in rates which your petitioner made, claiming the power under authority of its Federal charter, constituted a breach of the contract sued on, and justified the said Honorable Court of Civil Appeals in rendering the judgment against your petitioner, for the said sum of \$3,052.35/100, being all the amounts of the several payments and assessments made on said certificate to the old corporation, the unincorporated society, and your petitioner, and decided the further Federal question suggested by its answer, as well as impliedly included in plaintiff's petition, that it, your petitioner, had authority under its charter to insure persons, members of its organization who refused to obey its laws properly passed governing the Endowment Rank, of which they were a member.

Your petitioner further avers that there were no other sufficient or adequate grounds upon which to base said judgment.

Wherefore, your petitioner avers that by the judgment of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, it was denied the powers, right and privileges conferred on it by the statute of the United States which constituted its charter, and which was specially set up and claimed by it in the said cause.

377 Wherefore, your petitioner prays for an allowance of writ of error from the Supreme Court of the United States to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected, and said judgment reversed, and your petitioner will ever pray.

Respectfully submitted,

SUPREME LODGE, KNIGHTS
OF PYTHIAS, *Petitioner*,
By J. P. GOODRICH,
M. M. CRANE,
H. P. BROWN,
Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 9th day of January, A. D. 1915, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Sixty Five Hundred (\$6,500.00) Dollars.

Dated at Dallas, Texas, this 9th day of January, A. D. 1915.

ANSON RAINEY,
*Chief Justice, Honorable Court of Civil Appeals,
for Fifth Supreme Judicial District of Texas.*

378 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,

vs.

S. MIMS, Appellee.

Supreme Lodge, Knights of Pythias, in connection with petition for writ of error herein, makes the following the assignments of error, which it avers occurred on the final order and judgment herein, dated the 30th day of May, A. D. 1914:

I.

The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not ones of exclusive Federal jurisprudence, and making it incumbent upon that Court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said Court erred in holding and determining in said case that by the terms of the charter, of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance upon which said Mim's suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said Court erred in holding and determining that the re-rating of appellee, that is to say the raising of the monthly assessments to the sum of \$34.80 per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said Court erred in holding and determining in its said opinion that the re-rating or raising of the monthly assessments to the sum of \$34.80 constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said Court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said Court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have
380 authority to re-rate or raise said assessments above the amount of \$3.60 per month.

VII.

The said Court erred in not holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The Court erred in not holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the Rank of Insurance now in force (which meant the Rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said Court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said Court erred in rendering a judgment against your petitioner for any sum whatsoever.

SUPREME LODGE KNIGHTS OF
PYTHIAS, *Petitioner,*

By J. P. GOODRICH,
H. P. BROWN,
M. M. CRANE,
Its Attorneys.

381 [Endorsed:] Supreme Lodge, Knights of Pythias, appellant, vs. S. Mims, appellee. Petition for writ of error from Supreme Court of U. S. to Hon. Court of Civil Appeals of Fifth Supreme Judicial District of Texas, by Supreme Lodge Knights of Pythias, by J. P. Goodrich, H. P. Brown, M. M. Crane, its attorneys. Filed in Court of Civil Appeals, Jan. 9, 1915. Geo. W. Blair, Clerk 5th District.

382 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

The above and entitled matter coming on to be heard upon the petition of Appellant therein, for writ of error from the Supreme Court of the United States to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, and upon examination of said petition and the record in said matter, and desiring to give petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and the bond presented by said petitioner be and the same is hereby approved.

ANSON RAINEY,
Chief Justice.

383 In the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable, the Judges of the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas at Dallas, Texas: Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment in the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas at Dallas, before you, or some of you, being the highese court of law or equity of the said State in which a decision could be had in the said suit, between Supreme Lodge, Knights of Pythias, defendant and plaintiff in error, and S. Mims, plaintiff and defendant in error, wherein was drawn in question the construction of a clause of a statute of the United States, and the decision was against the right, title and privilege specially set up and claimed under said clause of said statute, a manifest error hath happened, to the great damage of the
384 said Supreme Lodge, Knights of Pythias, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties afore-

said in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 8th day of February next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court, may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward O. White, Chief Justice of the Supreme Court of the United States, the 11th day of January, 1915.

[The seal of the U. S. District Court, Northern Dist. Texas.]

LOUIS C. MAYNARD,
*Clerk of the United States District Court
for the Northern District of Texas, at Dallas.*

385 [Endorsed:] Supreme Lodge, Knights of Pythias, Appellant, vs. S. Mims, Appellee. Writ of Error. Crane & Crane, Attorneys.

386 In the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

Know all men by these presents, that we, Supreme Lodge, Knights of Pythias, a corporation, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto S. Mims, in the sum of Six Thousand Five Hundred (6,500.00) Dollars, to be paid to the said obligee, his successors, representatives, and assigns to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of January, A. D. 1915.

Whereas the above-named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

387 Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it

shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SUPREME LODGE, KNIGHTS OF
PYTHIAS,
By H. P. BROWN,
Its Agent and Attorney in Fact.
AMERICAN SURETY COMPANY
OF NEW YORK,
By G. G. SHEERIN,
Att'y in Fact.

[Seal of American Surety Company of New York.]

THE STATE OF TEXAS,
County of Dallas, ss:

On this the 9th day of January, A. D. 1915, before me personally appeared H. P. Brown, known to me to be the person who, as agent and attorney in fact for Supreme Lodge, Knights of Pythias, signed the name of said Supreme Lodge, Knights of Pythias to the above and foregoing bond, and who being by me duly sworn, deposes and says that he is agent and attorney in fact of said Supreme Lodge, Knights of Pythias, and that he had and has authority to execute the above bond as said agent and attorney in fact.

H. P. BROWN.

Subscribed and sworn to before me this 9th day of January,
A. D. 1915.

[SEAL.] N. M. COOK,
Notary Public, Dallas County, Texas.

388 THE STATE OF TEXAS,
County of Dallas, ss:

On this the 9th day of January, A. D. 1915, personally appeared before me G. G. Sheerin, who being by me duly sworn, deposes and says that he is agent of American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority conferred upon him by said corporation as its agent, and the said G. G. Sheerin acknowledged said instrument to be the free act and deed of said corporation.

G. G. SHEERIN.

Subscribed and sworn to before me this 9th day of January,
A. D. 1915.

[SEAL.] A. F. ALLEN,
Notary Public, Dallas County, Texas.

I hereby approve the foregoing bond and surety, this 9th day of January, A. D. 1915.

ANSON RAINEY,
*Chief Justice, Court of Civil Appeals
for the Fifth Supreme Judicial Dis-
trict of the State of Texas.*

389 [Endorsed:] Supreme Lodge, Knights of Pythias, Appel-
lant, vs. S. Mims, Appellee. Bond. Filed in Court of Civil
Appeals Jan. 9, 1915. Geo. W. Blair, Clerk 5th District. G. G.
Sheerin & Co., General Insurance Agents, Juanita Building, Dallas.
Phone Bell M. 4667. Crane & Crane, Attorneys.

390 In the Court of Civil Appeals for the Fifth Supreme Judicial
District of Texas, at Dallas.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant,
vs.
S. MIMS, Appellee.

UNITED STATES OF AMERICA, ss:

To S. Mims, Greeting:

You are hereby cited and admonished to be and appear at a Su-
preme Court of the United States, at Washington, within thirty (30)
days from the date hereof, pursuant to a writ of error filed in the
clerk's office of the Honorable Court of Civil Appeals for the Fifth
Supreme Judicial District of the State of Texas, wherein Supreme
Lodge, Knights of Pythias, is plaintiff in error and you are defend-
ant in error, to show cause, if any there be, why the judgment ren-
dered against the said plaintiff in error, as in the said writ of error
mentioned, should not be corrected and why speedy justice should
not be done to the parties in that behalf.

Witness the Honorable Anson Rainey, Chief Justice of Honorable
Court of Civil Appeals for the Fifth Supreme Judicial Dis-
trict of the State of Texas, this 9th day of January, A. D.
391 1915.

ANSON RAINEY,
*Chief Justice, Court of Civil Appeals for the Fifth
Supreme Judicial District of the State of Texas.*

Copy of the within citation received this — day of —, A. D. 1915,
and service thereof accepted.

Attorneys for S. Mims.

I hereby certify that on the 13th day of January 1915 that I de-
livered to L. C. McBride, Esq., Attorney for appellee S. Mims, in
person, a certified copy of this citation.

W. K. REYNOLDS,
Sheriff Dallas County, Tex.
By W. S. THOMPSON,
Deputy.

392 [Endorsed:] Supreme Lodge, Knights of Pythias, Appellant, vs. S. Mims, Appellee. Citation. Crane & Crane, Attorneys.

393

No. 6997.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
vs.
S. MIMS.

Bill of Costs.

Cost in District Court, Dallas County.....	\$115.15
Cost in Court of Civil Appeals.....	150.40
Cost in Texas Supreme Court.....	7.60
	<hr/>
	\$273.15

394 THE STATE OF TEXAS:

I, Geo. W. Blair, Clerk of the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing contains a true copy of the transcript of the record sent up from the District Court of Dallas County, Texas, Statement of Facts, and the opinions, judgment, motion for rehearing and all orders made in said Court of Civil Appeals, and the Judgment of the Supreme Court of Texas, refusing writ of error, the petition for writ of error to the Supreme Court of the United States, order granting writ of error, and assignments of error, and approval of bond, bond for writ of error, writ of error, and citation, and also original petition for writ of error and assignment of error, Order granting writ of error and approval of bond, bond for writ of error and citation, and a correct statement of the costs accrued in the District Court of Civil Appeals and the Supreme Court of Texas in the case of Supreme Lodge, Knights of Pythias v. S. Mims, No. 6997, on the docket of said Court of Civil Appeals.

Given under my hand and seal of Office at Dallas, Texas, this 29th day of January, A. D. 1915.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR, *Clerk.*

Endorsed on cover: File No. 24,552. Texas Court of Civil Appeals, 5th Supreme Judicial District. Term No. 808. Supreme Lodge, Knights of Pythias, plaintiff in error, vs. S. Mims. Filed February 8th, 1915. File No. 24,552.

7
MIMS v. SUPREME LODGE

FILED

APR 12 1912

JAMES C. MARSH

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. [REDACTED] 345

SUPREME LODGE KNIGHTS OF PYTHIAS,

Plaintiff in Error,

vs.

S. MIMS, *Defendant in Error.*

In Error to the Court of Civil Appeals of the Fifth Supreme
Judicial District of the State of Texas, at Dallas.

MOTION TO DISMISS, AFFIRM, OR TRANSFER TO
SUMMARY DOCKET, AND FOR DAMAGES
FOR DELAY, AND BRIEF.

THOMAS F. WEST,

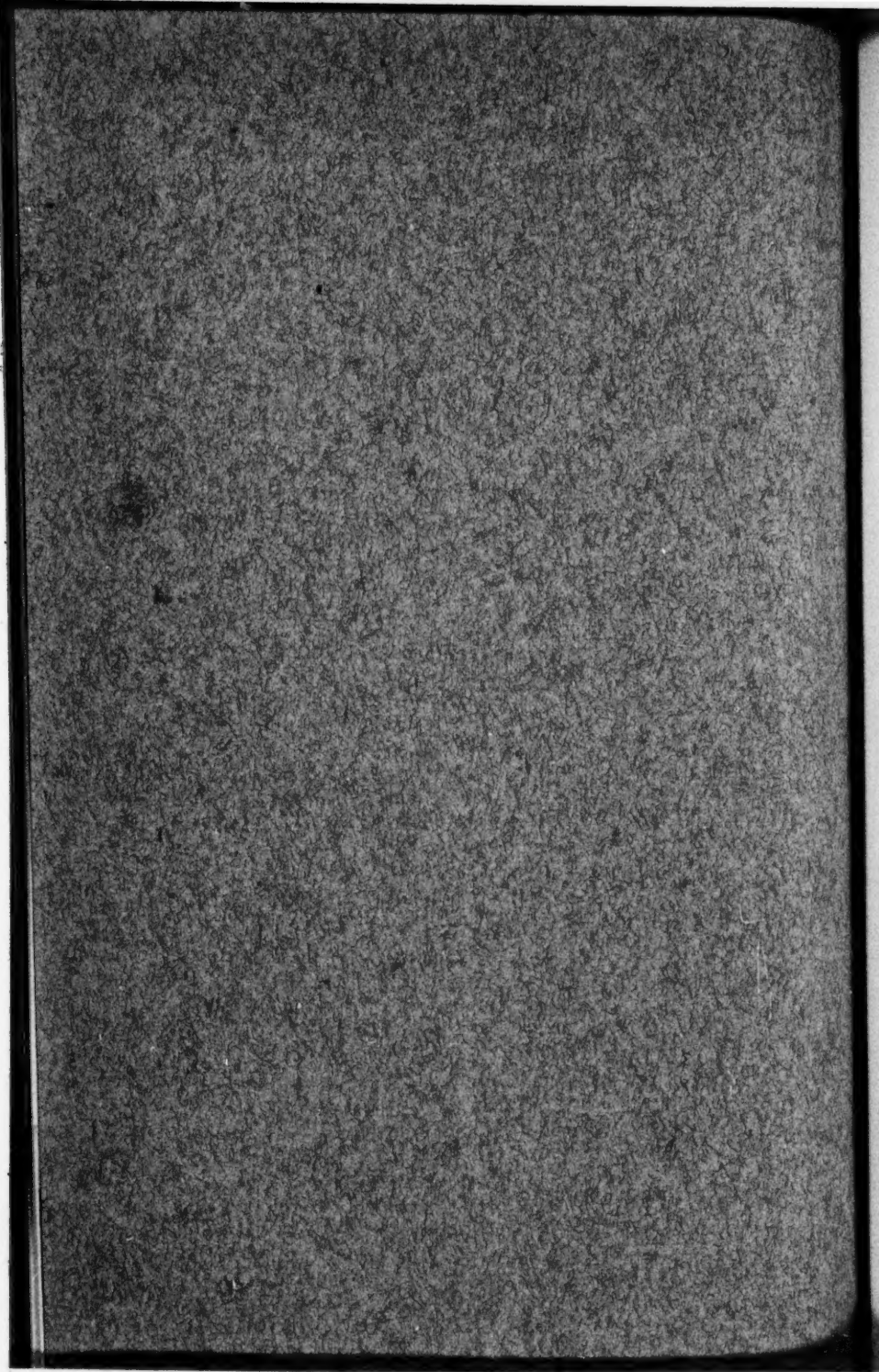
Of Fort Worth, Texas,

LAWRENCE C. McBRIDE,

Of Dallas, Texas,

Attorneys of Record for Defendant in Error.

(26,452)



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

S. MIMS, *Defendant in Error.*

In Error to the Court of Civil Appeals of the Fifth Supreme
Judicial District of the State of Texas, at Dallas.

**MOTION TO DISMISS, AFFIRM, OR TRANSFER TO
SUMMARY DOCKET, AND FOR DAMAGES
FOR DELAY, AND BRIEF.**

Now comes the defendant in error, S. Mims, by his attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument.

Third. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

Fourth. To adjudge to defendant in error just damages for delay, and single or double costs, at the court's discretion.

THOMAS F. WEST,

Of Fort Worth, Texas,

LAWRENCE C. McBRIDE,

Of Dallas, Texas,

Attorneys of Record for Defendant in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will, on the 3rd day of May, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, all of which are now served upon you herewith.

THOMAS F. WEST,

Of Fort Worth, Texas,

LAWRENCE C. McBRIDE,

Of Dallas, Texas,

Attorneys of Record for Defendant in Error.

THE STATE OF TEXAS,)
COUNTY OF DALLAS.)

I, the undersigned, Lawrence C. McBride, do upon oath state that I am attorney of record for the defendant in error in the above motion, and that I personally did, on the 8th day of April, 1915, deliver to M. M. Crane at his office and address in the City of Dallas, Texas, he being attorney of record for plaintiff in error in said motion, a true copy of said motion and of the foregoing notice, and the brief attached thereto and referred to therein.

L. C. McBride

Subscribed and sworn to before me this 9th day of April, 1915.

Henry P. Edwards

Notary Public, Dallas County, Texas.

II.

FACTS.

This is a proceeding in error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas at Dallas, to review a judgment of that court affirming the judgment of the District Court of Dallas County, Texas, in favor of the plaintiff, S. Mims (defendant in error herein), against the Supreme Lodge Knights of Pythias, defendant (plaintiff in error herein), for damages for breach of the insurance contract held by defendant in error against plaintiff in error. The writ of error was allowed by the Chief Justice of said Court of Civil Appeals.

The Chief Justice of said Court of Civil Appeals did not indicate the supposed Federal question upon which he allowed the writ. Jurisdiction of this court is sought under Section 237 of the Judicial Code:

"Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute thereof, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority," etc.

The contention of plaintiff in error is that to raise its rate of assessment against the policy of insurance of defendant in error was a right or privilege expressly granted to it under the terms of the Act (see section 4 thereof) incorporating the plaintiff in error, which was passed by Congress and approved by the President on June 29, 1894, and which Act was as follows:

"ACT OF INCORPORATION.

"Be it enacted by the Senate and House of Representatives of the United States, etc.

"That (naming sundry persons residing in several States), officers and members of the Supreme Lodge Knights of Pythias, and their successors, be and they are hereby incorporated and made a body politic and corporate in the District of Columbia, by the name of 'Supreme Lodge Knights of Pythias,' and by that name it may sue and be sued, plead and be impleaded, in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and privileges incidental to fraternal and benevolent corporations within the District of Columbia.

"Sec. 2. That the said corporation shall have the power to take and hold real and personal estate, not exceeding in value One Hundred Thousand Dollars, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation.

"Sec. 3. That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in Section 1 of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.

"Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State.

"Sec. 5. That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.

"Sec. 6. That Congress may at any time amend, alter, or repeal this Act. Approved June 29th, 1894."

The facts material to the controversy were found by said Court of Civil Appeals and so far as necessary are now stated:

FINDINGS OF FACT.

Appellee brought this suit against the appellant May 19, 1911, to recover damages for the breach of a benefit certificate, or contract of insurance, issued to the appellee on the 29th day of May, 1885, by a corporation known as the Supreme Lodge Knights of Pythias of the World. From a judgment in favor of plaintiff, the defendant appealed.

The material facts are substantially as follows: On or about August 5, 1870, a fraternal beneficiary association designated the Supreme Lodge Knights of Pythias of the World was incorporated under and by virtue of an act of Congress of the United States approved May 5, 1870 (16 Stat. 98, c. 80). By the terms of the act of incorporation of said fraternal association, the charter thereof expired on or about the 5th day of August, 1890. The defendant in this case, the Supreme Lodge Knights of Pythias, was incorporated by an act of Congress of the United States approved by the President June 29, 1894 (28 Stat. 96, c. 119), and since said date the appellant continued to act under and by virtue of said original act of incorporation and the amendments thereto, up to the date of this suit, and since said time. Between the date of the expiration of the charter of the old corporation known as the Supreme Lodge Knights of Pythias of the World, which charter expired, as above stated, on the 5th day of August, 1890, and the date of the incorporation and the charter of the appellant in this case, an unincorporated society, known as the Supreme Lodge Knights of Pythias, or Supreme Lodge Knights of Pythias of the World, carried on business

under the laws existing in 1890. On April 11, 1879, appellee made his application to the Endowment Rank of the old corporation referred to, chartered in 1870, for certificates of insurance in what was known as the first and second class of said Endowment Rank, and said application contained the following stipulation:

"I hereby agree to conform to and obey the laws, rules and regulations of the order governing this rank now in force, or that may hereafter be enacted, or submit to the penalties therein contained."

Upon said application two contracts of insurance or benefit certificates, one for the sum of \$1,000.00 and the other for the sum of \$2,000.00, to be paid to plaintiff's wife upon notice and proof of his death and good standing in the rank at the time of his death, were issued to plaintiff on the 30th day of April, 1879. The application upon which these certificates were issued was made a part thereof, and the respective amounts therein agreed to be paid were payable upon condition that the plaintiff paid all assessments to the Endowment Rank as required and a full compliance with all the laws governing said rank "now in force, or that may hereafter be enacted." Each of these certificates also contained the following:

"And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing the rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof."

On May 7, 1885, plaintiff made application to be transferred to what was known as the fourth class (which had been created in 1884) of the Endowment Rank of the corporation, chartered in 1870, and surrendered all his right, title

and interest in and to the two certificates mentioned. There was then issued to plaintiff, on the 29th day of May, 1885, a benefit certificate wherein—

“in consideration of the representations and declarations made in his application bearing date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in first and second classes for cancellation, as requested in his application for transfer to the fourth class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World to Mary J. Mims, wife, as directed,” etc.

This certificate, like the two first issued, contained the following clause:

“And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.”

The two certificates issued to plaintiff in 1879 were issued upon what is known as the “post mortem plan,” by which, upon death of a member in one of said classes, an assessment was levied upon the remaining members, and out of the proceeds of such assessment the certificate issued was paid. Article 5 and 1 of the laws passed in 1884 by the incorporation chartered in 1870 provides:

“In addition to the three classes specified in section 2 of article 4 of this constitution, there shall be a class en-

dowment designated as the fourth class. In said class the benefit to be obtained may be one thousand dollars, two thousand dollars, or three thousand dollars, at the option of the applicant."

Section 4 provides:

"The endowment fund for the payment of benefits in the fourth class shall be derived from monthly payments from each member, said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to be taken at the nearest anniversary of his birthday. So much of the monthly payments as shall equal the actual cost of the endowment shall constitute the endowment fund, and the residue of such monthly payments shall be placed in the reserve fund. Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues. The said monthly payment of endowment and reserve shall be according to the following table."

Then follows a table of rates varying from ages 21 to 60, inclusive, in which was:

"Age at admission, 42. Cost or amount of endowment fund, 50c. Amount of reserve, 70c. Table monthly payments for each one thousand dollars, \$1.20."

The plaintiff, at the date of his application in April, 1879, was 42 years old. Section 5 is:

"Until one monthly payment by members holding an equal amount of endowment, less the amount placed in reserve, shall be sufficient to pay the amount of endowment held by a brother, the benefit to be paid in case of death shall be a sum equal to one payment by each member holding an equal amount of endowment, less the amount to be placed in reserve."

Section 7 is:

"The expenses of conducting the business of the fourth class shall be paid out of the reserve fund."

Section 9 is:

"All the laws, forms and business details of the Endowment Rank heretofore made and hereafter enacted shall apply with full force to the fourth class and the members thereof, so far as they are applicable thereto, and so far as they are not changed by the provisions of this article."

In the laws adopted in July, 1888, it is provided:

"Each member of the Endowment Rank shall, on presenting himself for obligation, pay the secretary of the section, in accordance with his age, and the amount of endowment applied for, a monthly assessment as provided in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank, unless otherwise provided for by the Supreme Lodge Knights of Pythias of the World."

Then follows a table of monthly payments provided for in said laws. Section 3 of said laws provides that special assessments may be made upon all members of the Endowment Rank by the board of control when necessary to meet the liabilities of the rank, and section 17 of said laws is as follows:

"The board are hereby empowered and directed to re-rate the members transferred from the first, second and third classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the fourth class at the age they were when becoming members of the first, second and third classes. The board is instructed to re-rate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said re-

rating to take effect at such date as the board shall prescribe on and after the 1st day of August, 1888, and the board is further empowered to rerate the present tables of the fourth class, applying it to all members should such action become necessary for the proper protection and perpetuity of the rank."

In July, 1901, at its biannual session, the Supreme Lodge of the defendant passed a law that each applicant for membership in the Endowment Rank should, upon completion of his application for transmission to the board of control, pay the secretary of the section, in accordance with his age, occupation, and the amount of endowment applied for, a monthly payment as provided in section 5, and that, if accepted, such member should continue to pay the same amount each month thereafter as long as he remained a member of the Endowment Rank, except as provided in section 6 of the article, or unless otherwise provided for by enactment of the Supreme Lodge or board of control of the Endowment Rank Knights of Pythias of the World. (Said sections 5 and 6 do not appear in the record.) The plaintiff, upon the expiration of the charter of the old corporation in 1890, paid to the unincorporated society above referred to from the year 1890 up to June, 1894, when defendant herein was incorporated, the dues upon the certificate made the basis of this suit, according to the laws under which said unincorporated society was transacting business, and, after the defendant was incorporated, he paid to it dues and assessments required by it to be paid up to some time in 1910, but there seems to be no direct testimony that plaintiff knew of the unincorporated society or defendant, or had knowledge of the laws of either. The defendant was incorporated in 1894, as stated, by an act of the Congress of the United States, and then acquired and took over the membership, insurance business, and all the assets of the said former corporation and unincorporated society. The

rate plaintiff was required to pay when he went into the fourth class was \$3.60 per month, and in 1888 it was raised to \$4.50 per month, in 1894 to \$4.65 per month, and in 1901 to \$7.35 per month. These raises in the rates were paid by plaintiff, but he swears he paid them under protest.

In August, 1910, the defendant, in convention assembled, enacted a law declaring that every member of the fourth class, on January 1, 1911, should be rerated according to his attained age and occupation, and the amount of benefit provided for in his certificate, unless the member should elect to take some one of certain options offered him, and plaintiff was notified that, if he did not elect to take one of said options and desired to continue the amount of his certificate, beginning with the month of January, 1911, and for each month thereafter, his monthly payments would be \$34.80. The law then passed also provided that:

"Any member of the fourth class who shall fail to pay, when due, said monthly payment, shall thereby *ipso facto* cease to be a member and his certificate, with all rights thereunder in said fourth class shall thereby terminate, subject to the provisions of the laws with reference to reinstatement."

Plaintiff declined to accept either of the options tendered him, refused to pay the raised rate of \$34.80, and on January 20, 1911, tendered the local secretary at Fort Worth, where his membership was, \$22.05 for the three months of January, February and March, 1911, at the old rate of \$7.35 per month, which tender was made in writing and declined. Plaintiff was then 74 years of age, and uninsurable, it seems, in any other fraternal order. It is provided in the laws passed in 1884 that:

"These laws may be altered, or amended, at any regular session of the Supreme Lodge Knights of Pythias by a two-thirds vote."

The amended laws of 1910 contained the further provision that the right to change, increase, or adjust the schedules of rates in the fourth and fifth classes, respectively, or any of them, is expressly reserved to the Supreme Lodge, as is also the right to apply any such change, increase or adjusted schedule of rates to all the members as of the date of their adoption, without regard to the date of any member's certificate. This right of adjustment includes the right to advance members without reference to the plan or class of which they are members to their attained age at any time, and apply the new rates applicable thereto when deemed necessary by the Supreme Lodge to carry out the purposes of the insurance department; and, further, that no member of the insurance department should have any divisible interest in the funds or properties of the insurance department, and, except as provided for in the laws with respect to the members of the fifth class, there should be no apportionment of any of said funds at any time, etc.

The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from appellee monthly payment of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance by it and broken. Evidently defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the defendant's charter which is set out in our statement of the

facts obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof.

The plaintiff charged, among other things, that the defendant, by the rerating of the members and raising the dues and assessments required of plaintiff, and the passage of said 1910 law breached its contract with defendant in error, and he prayed that he have judgment against defendant for the amount of assessments paid, with interest thereon. The trial court peremptorily instructed a verdict accordingly, and said Court of Civil Appeals affirmed the judgment, and the Supreme Court denied a writ of error.

LOWER COURT'S CONCLUSIONS OF LAW.

Said Court of Civil Appeals held that the laws and amendments passed after the contract of insurance was entered into were prospective in their operation and should not be given a retro-active effect; that the reservation of the general power to amend the constitution and by-laws of the plaintiff in error and the provisions in said insurance contract binding the assured to conform to and obey subsequent laws, rules and regulations, related only to the member's duties and obligations as such, and did not authorize a radical change in the terms of his insurance contract, and held that the passage of the amended law of 1910 was a breach of the terms of said contract as entered into with defendant in error when he entered the fourth class.

Said Court of Civil Appeals did not consider that any Federal question was at issue. It states in its opinion:

"We are not aware of any authority supporting the contention of appellant that the question (or any of the questions) presented for decision is to be one of exclusive 'federal jurisprudence,' and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant, in this case. It is true that the charter of the defendant was granted by a special act of Congress, which conferred upon the corporation general authority to amend its constitution, at pleasure, provided such amendment did not conflict with the laws of the United States, or of any state, but this fact does not sustain the proposition that such is the character of the questions involved. It may be said, however, in passing, that the conclusion we have reached upon the main question presented for determination is, we think, supported by decisions of both federal and state courts."

III.

POINTS AND AUTHORITIES.

A grant of power to a corporation is to be strictly construed against it.

Pearsall vs. Great Northern R. R. Co., 161 U. S., 646.

Where a right or privilege is claimed under the charter of a corporation, nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear.

Northwestern Fertilizer Co. vs. Hyde Park, 97 U. S., 1036.

In certain classes of mutual benefit societies it is very common to refer to the "constitution" of such bodies, but this is clearly a misnomer. A constitution of a voluntary society or corporation is nothing more than a by-law under an inappropriate name.

1 Thompson Corporations, 2 Ed., Sec. 981.

The authority to pass by-laws is, as a matter of course, authority to pass such as are consistent with the articles of incorporation, and not a power to subvert the law of corporate existence.

1 Thompson Corporations, 2 Ed., Sec. 997.

By-laws cannot be made to act retrospectively. They are rules for future action. Moreover, a by-law, or resolution, means a rule of future action. *Ex post facto* laws are no more lawful for a corporation than for states. All by-laws contrary to the general principles of the common law, or the policy of the state, or repugnant to the law of the land, are void.

1 Thompson Corporations, 2 Ed., Secs. 995, 1052.

Where a statute provides that corporations have power to make by-laws not inconsistent with existing laws, it is held

that the term "existing laws" had reference not only to statutes, but also to the decisions of the courts as to the powers of corporations.

1 Thompson Corporations, 2 Ed., Sec. 996, citing:
Raub vs. Gerken, 111 N. Y. Sup., 319.

"Laws of the State," as used in Vermont Revised Laws, Secs. 3610-3618, provided that, before an insurance company located in a sister state could make a valid contract of insurance in Vermont, it must obtain from the Secretary of State a license for that purpose, and must be responsible by the "laws of the State" in which it is situated for the acts and neglects of its agents, means not only statutory laws, but includes as well the common law.

Lycoming Fire Ins. Co. vs. Wright, 60 Vt., 515; 12 Atl., 103.

"That said corporation shall have a constitution and shall have power to amend same at pleasure; provided that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." Should "laws" as here used be restricted in its meaning to statutory or constitutional, and not to common law or decisions, the amended by-laws complained of would be equally void as opposed to the constitution, as depriving the assured of his property without due process of law.

The alteration of a by-law is by the making of another upon the same matter. If the first must be reasonable and in accord with the principles of law, so must that which alters it. If, then, the power is reserved to alter, amend or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws agreeable to law. But a by-law

that will disturb a vested right is not such. No alteration could be made which would infringe a right already given and secured by the contract of the corporation.

Kent vs. Quicksilver Mining Co., 78 N. Y., 159.

Gray vs. Portland Bank, 3 Mass., 364.

Every corporation has the right to make and change its by-laws in a manner not inconsistent with law, but such right does not give it the power to change its written contract or impose upon a party contracting with it obligations which were never assumed.

Rockwell vs. Knights Templars etc., 119 N. Y. Sup., 515.

If it appears from the face of the record that the decision of the state court is entirely consistent with the construction of a Federal statute contended for by the plaintiff in error, no case is made out for the appellate jurisdiction of the Supreme Court of the United States.

Ocean Ins. Co. vs. Polleys, 13 Pet., 157.

When the jurisdiction of this court is invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right so set up and claimed was expressly denied, or that such was the necessary effect in law of the judgment.

Chicago, B. & O. R. Co. vs. Chicago, 166 U. S., 226.

Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did base it upon the latter ground, the Supreme Court will not take jurisdiction, even though it thinks the state court decision erroneous.

Klinger vs. Missouri, 13 Wall., 257.

A decision by a state court holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a Federal question for review by the Supreme Court of the United States on writ of error.

Pittsburgh & L. A. Iron Co. vs. Cleveland Iron Min. Co., 178 U. S., 270.

(In the instant case the court has held that the rights of the parties are determined by the *contract* made in 1885.)

Where the Federal question involved in a case were correctly decided by the state supreme court, the judgment of that court must be affirmed without determining any other questions not of a Federal character.

Swope vs. Leffingwell, 105 U. S., 3.

"If the Federal question raised in the state court was erroneously decided, then this court must inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue."

Murdock vs. Memphis, 20 Wall., 590.

Where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hammond vs. Connecticut Mut. L. Ins. Co., 150 U. S., 633.

Fair color for claiming that rights under the Federal Constitution have been violated is necessary to give jurisdiction

to the Supreme Court of the United States on writ of error to a state court based on such Federal question.

Wilson vs. North Carolina ex rel. Caldwell, 169 U. S., 586.

A decision which does not deny the validity of an act of Congress, or deny any right claimed under it, does not present a Federal question merely because the rights of the parties were in some respects based upon an act of Congress.

Missouri P. R. Co. vs. Fitzgerald, 160 U. S., 556.

It does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction, because the suit might have been brought in a circuit court of the United States or removed thereto from the state court, on the ground that it arose under the laws of the United States.

Texas & P. R. Co. vs. Griffin, 151 U. S., 105.

The Federal Supreme Court, on a writ of error to a state court, has not the jurisdiction of a general reviewing court in error, but is limited to a consideration of the specific instances of denials of Federal rights.

Waters-Pierce Oil Co. vs. State of Texas, 212 U. S., 86.

The legal correctness of the rule by which the damages were ascertained and assessed in the state court is not reviewable in the Supreme Court of the United States.

Gelston vs. Hoyt, 3 Wheat., 246.

The conclusion of delay necessarily follows where the asserted Federal question is of an unsubstantial and frivolous character; and the damages will be awarded whether the case is affirmed or dismissed.

Deming vs. Carlisle, 226 U. S., 102.

Where, upon writ of error, judgment is affirmed in the Supreme Court, the court shall adjudge to the respondents in error just damages for delay, and single or double costs, at its discretion.

R. S., Sec. 1671.

IV.

ARGUMENT.

Following the rules announced by this court in the decisions above quoted, that where the state court may properly have disposed of the case without deciding a Federal question, and certainly where it actually has done so and predicated its holding upon other grounds, this court will not review its action, we do not see how it can be asserted that this court should entertain this case. The judgment of the Court of Civil Appeals complained of not only may be supported upon non-Federal grounds, but it is apparent from its very decision that the court was not even influenced by the presence of a supposed Federal question in reaching its conclusion. Certainly the conclusion that the passage of a by-law by the plaintiff in error in 1910 which raised the rate of assessment against defendant in error from \$7.35 to \$34.80 a month as to his then attained age, and rerated him also according to his occupation, and which made other important changes as enumerated at page 13 hereof, was a breach of the contract made with him in 1885, by the terms of which his monthly rate was fixed at \$3.60 per month and "to continue the same so long as his membership continued," and by which his payment per month was to be "graded according to the age of the member at the time of making application, and his expectancy of life," is in no sense to rule that plaintiff in error was deprived of a right or privilege given it in its charter to raise its monthly rate of assessment, even should it be conceded that such right or privilege was actually granted to it in the language "that said corporation shall have a constitution and shall have power to amend same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." Such right or privilege might be con-

ceded as granted under such language, but this would have nothing to do with the question actually decided by the court and just now referred to. A corporation having such right of amendment of its by-laws might, wholly apart from this fact, be bound by contract to defendant in error, as the court has thus held it to have been bound. It might, for argument's sake, even be conceded that it might in a proper case, and as applied to a given state of facts, be held to have been denied such right or privilege, but not so as applied to the facts of the instant case. This court's apt language and to the point appears in *Ocean Insurance Co. vs. Polleys*, 13 Pet., 157:

"If it appears from the face of the record that the decision of the state court is entirely consistent with the construction of a Federal statute contended for by the plaintiff in error, no case is made out for the appellate jurisdiction of the Supreme Court of the United States."

It is but another application of the announcement of this court (*Klinger vs. Missouri*, 13 Wall., 257), that where the judgment of a state court might have been based either upon a Federal, or some other independent ground, and it appears that the court did base it upon the latter ground, the Supreme Court will not take jurisdiction, "even though it thinks the state court decision erroneous." Or, as expressed otherwise in *Murdock vs. Memphis*, 20 Wall., 590:

"If the Federal question raised in the state court was erroneously decided, then this court must inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment. If this is found to be the case the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue."

It can scarcely be seriously contended, we think, that Congress intended, by providing in section 4 of the charter of plaintiff in error that it should have a constitution and should have power to amend same at pleasure, to destroy the affect of

the provision just so carefully inserted in the immediately preceding section of the charter that "all claims, accounts, debts, things in action, or other matters of business of whatsoever nature" then existing against the Supreme Lodge Knights of Pythias, should survive against the plaintiff in error. Such contention is illogical and frivolous, and certainly so when Congress has further enacted, in granting the charter, that such amendments must "not conflict with the laws of the United States or of any state." The charter being granted plaintiff in error upon the express condition that it should carry out the contract of defendant in error, it is frivolous to contend that Congress intended by section 4 of the charter to give plaintiff in error the unrestricted right acting upon its own whim and caprice, or even necessities, to oppose the policy of Congress as announced in section 3 of the charter to see that the contract of defendant in error was carried out in its entirety.

But if the intention of Congress were not otherwise apparent, it immediately becomes so from the language "provided that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." That "laws" of the United States or of any state as here used embrace and include as well the common law and decisions, as constitutional and statutory law, is apparent from the authorities above cited. We thus have the anomaly of the plaintiff in error seeking entrance into this court upon the contention that its charter gave it the privilege or right to pass the amended by-law complained of, when its very act of incorporation has expressly provided that no such amended by-law should be valid when in conflict with the decisions of the highest court of a state,—the very decision under review.

Assuredly, it seems to us, does the contention grow more absurd when the rule is applied that where a right or privilege

is claimed under a corporate charter, the grant of power to the corporation is to be strictly construed against it, and nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally as clear.

Congress, of course, in passing the act and providing that amendments of the constitution of plaintiff in error must not conflict with the laws of the United States or of any state, had in mind the well settled rule that the reserved power to alter, amend or repeal by-laws is to pass reasonable by-laws agreeable to law and such as will not disturb rights already given.

Kent vs. Quicksilver Mining Co., 78 N. Y., 159;

Rockwell vs. Knights Templars, 119 N. Y. Sup., 515.

Furthermore, the right given plaintiff in error in its charter to amend its constitution (by-laws), clearly had reference only to amendments or rules relating to future action, for "a by-law or resolution means a rule for future action" (1 Thompson Corporations, 2 Ed., Sec. 1052), and was not even attempting to confer the right by amendment to pass a by-law which would be retrospective in its operation. "By-laws can not be made to act retrospectively." (*Idem.*)

Counsel for plaintiff in error will contend that its act of incorporation, in section 3 thereof, did not bind it to pay the obligations of the extinct corporation, but only the obligations of the then existing unincorporated association, which had been carrying on the business since the expiration of the charter of the old corporation, but this contention is frivolous in view of the findings of the court above set forth that the defendant took over and absorbed the entire insurance business of said extinct corporation and of said unincorporated association which succeeded it, and that defendant in error paid to the unincorporated society throughout its entire existence, and continuously thereafter for seventeen years to plaintiff in

error monthly payments of assessments upon the contract of insurance, and of the undisputed fact that plaintiff in error assumed the liabilities of said society. (Witness Powers, general secretary of plaintiff in error, printed record, page 163.) It matters not, therefore, whether by "present" Supreme Lodge Knights of Pythias, in said section of the charter, Congress alluded to the extinct corporation or to the then operating unincorporated society, for these facts show that such unincorporated society had itself become bound to carry out said contract equally as the former corporation was bound.

Counsel for plaintiff in error may discuss the measure of damage as applied by the court below; if so, the answer is that the Federal Supreme Court, on a writ of error to a state court, has not the jurisdiction of a general reviewing court in error, but is limited to a consideration of the specific instances of denials of Federal rights. (*Waters-Pierce Oil Co. vs. State of Texas*, 212 U. S., 86.) The legal correctness of the rule by which the damages were ascertained and assessed in the state court is not reviewable in the Supreme Court of the United States. (*Gelston vs. Hoyt*, 3 Wheat., 246.)

Under the announcement of this court in *Deming vs. Carlisle*, 226 U. S., 102, the conclusion of delay necessarily follows where the asserted Federal question is of an unsubstantial and frivolous character; and damages for delay may be awarded, be the case dismissed or affirmed. We submit that this is a proper case for such damages, and likewise for the award of double costs in the discretion of the court, in view of unsubstantial and frivolous nature of the contentions involved and the obvious attempt to delay the case by this proceeding.

The record shows that the defendant in error is an aged man, now about 78 years old. That this case has been pending

since May 19, 1911; and that there is no merit in this attempt to further protract the enforcement of his judgment.

WHEREFORE, the defendant in error prays as in the above motions.

THOMAS F. WEST,
Of Fort Worth, Texas,

LAWRENCE C. McBRIDE,
Of Dallas, Texas,

Attorneys of Record for Defendant in Error.

V.

APPENDIX.

The entire record is printed. It is not, therefore, thought necessary to print any portion of same separately here. For convenience the assignments of error are given.

ASSIGNMENTS OF ERROR.*I.*

The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not exclusive Federal jurisprudence, and making it incumbent upon that court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said court erred in holding and determining in said case that by the terms of the charter of your petitioner, it, Supreme Lodge Knights of Pythias, was obligated to perform the contract of insurance upon which said Mim's suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said court erred in holding and determining that the rerating of appellee, that is to say the raising of the monthly assessments to the sum of \$34.80 per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said court erred in holding and determining in its said opinion that the rerating or raising of the monthly assessments to the sum of \$34.80 constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon did not have authority to rerate or raise said assessments above the amount of \$3.60 per month.

VII.

The said court erred in not holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The court erred in not holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or

that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said court erred in rendering a judgment against your petitioner for any sum whatever.

FILED

MAY 5 1915

JAMES D. WARD
CLERK

IN ERROR

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [REDACTED] 345

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

S. MIMS,
Defendant in Error.

In Error to the Court of Civil Appeals for the Fifth Supreme Ju-
dicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR AND ANSWER TO MOTION TO
DISMISS WRIT OF HABEAS.

CRANE & CRANE,
H. P. BROWNE,
JAMES P. GOODRICH,
SOL. H. EMMETT,
JAMES D. WATSON,
WARD H. WATSON,

Attorneys for Plaintiff in Error.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

v.

S. MIMS,
Defendant in Error.

**In Error to the Court of Civil Appeals for the Fifth Supreme Ju-
dicial District of the State of Texas.**

**BRIEF FOR PLAINTIFF IN ERROR AND ANSWER TO MOTION TO
DISMISS WRIT OF ERROR.**

STATEMENT OF THE CASE.

Defendant in error, as plaintiff in the District Court of Dallas County, Texas, filed a suit May 19, 1911, (Printed record, pp. 1 and 4) against plaintiff in error as defendant, alleging that it was a corporation organized under the laws of some State other than Texas, and engaged in the life insurance business, further alleging that it had issued to him a policy in 1879, and that thereafter on May 29, 1885, had exchanged it for one for three thousand dollars,

issued to his wife as beneficiary. (Printed record, p. 1.)

On February 14, 1913, plaintiff filed an amended petition in lieu of his original petition, in which he materially changed his allegations. He then alleged that in the year 1870 there was incorporated under a general law enacted by the Congress of the United States a certain insurance order or company, the "Supreme Lodge, Knights of Pythias", otherwise known and frequently denominated thereafter as "Supreme Lodge, Knights of Pythias of the World"; that by the express terms of the general law of the Congress under which said corporation was incorporated, the life of said corporation *expired in the year 1890*; that said company continued after its incorporation down to the time of its death by law, or expiration of its charter in said year 1890, to engage in the business of life insurance, issuing policies of insurance upon the lives of persons; that on April 11, 1879, plaintiff obtained from said company a written policy of insurance or benefit certificate insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named; that afterwards, on May 29, 1885, said corporation so issuing said policy issued and delivered to plaintiff in lieu of said former insurance policy another written policy of insurance or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of three thousand dollars (\$3,000.00) upon notice and proof of plaintiff's death in good standing

at the time of his death in what was denominated and known as the "Endowment Rank" of said corporation, said benefit certificate further stipulating and providing that if, at plaintiff's death, one monthly payment to the Endowment Fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his \$3,000.00), that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said Endowment Fund by each member holding an equal amount of endowment. That plaintiff continued carrying his said policies with said company until the expiration of its existence by terms of law, as aforesaid, whereupon the officials in charge of the affairs of said company at its decease, and their successors, continued thereafter for a period of several years, and until the incorporation of the defendant herein in the year 1894, to take and acquire and remain in possession of the assets of said deceased company, and to continue and carry on as formerly, its business as an unincorporated association, but still under the name "Supreme Lodge, Knights of Pythias", or "Supreme Lodge, Knights of Pythias of the World;" that thereupon, and thereafter, and in the year 1894, the defendant herein, the "Supreme Lodge, Knights of Pythias" was incorporated under a special act of the Congress of the United States, since which time said defendant has continued to be, and is now

a corporation duly incorporated and engaged in the business of life insurance, issuing policies of insurance upon the lives of persons; that by the express terms and conditions of the charter of the defendant company it was provided and stipulated that

“all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section one of this act, shall survive and succeed to and against the body, corporate and politic, hereby created,”

whereby it was expressly stipulated and provided that the defendant in accepting its charter should undertake and obligate itself in all respects to carry out the terms of all insurance policies of the former corporation aforesaid, or of said unincorporated association. Furthermore, plaintiff avers, and shows the fact to be, that the defendant at all times since its incorporation, has accepted dues, payments and premiums from the plaintiff, and in all respects bound itself in law and in fact, to carry out plaintiff's said contracts of insurance. That the defendant acquired and took over all the assets of said former corporation and of said unincorporated association.

That at all times plaintiff was and remained a member in good standing of the Endowment Rank of said corporation which issued said policies, and in all respects continued and remained in good standing in both of the corporations and the unincorpo-

rated association mentioned herein, and continued at all times to carry out and comply with all the terms and conditions of this insurance aforesaid, and desired and expected to continue to do so, notwithstanding which fact the defendant herein, while plaintiff's said insurance was in full force and effect, did on or about August 2, 1910, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally pass and promulgate and put into force, certain pretended laws or amended laws, wherein and whereby the defendant demanded and required of plaintiff that plaintiff should, beginning with the month of January, 1911, pay the defendant the large sum of \$34.80, monthly dues and assessments, as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only \$7.35 dues and assessments, per month, as a condition precedent to the recognition and maintenance of said policies, and certainly was not authorized in law to exact more than said last mentioned sum, and not even that amount, as it was a part and condition of plaintiff's contracts of insurance as aforesaid, that the monthly rate of assessment to be paid by plaintiff should never at any time exceed the amount of, to-wit, \$3.60 per month, by virtue of the fact that there was established in the year 1884 what was known and denominated as the fourth class of the Endowment Rank of said first incorporated company, as aforesaid, and it was ex-

pressly provided by the constitution or by-laws of said company, which provisions became and were a part of plaintiff's contracts of insurance aforesaid, that the Endowment Rank, for the payment of benefits in said fourth class, should be derived from monthly payments by each member (of which plaintiff was one), said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application (meaning his application for membership in said Endowment Rank) and his expectancy of life, the age to be taken at the nearest anniversary of his birthday; that the monthly payments should be based upon the average expectancy of life of the applicant, and should continue the same so long as his membership continued, by reason of the monthly assessment rate to be paid by plaintiff upon his said \$3,000.00 of insurance was expressly limited and agreed never to exceed said sum of to-wit, \$3.60 per month.

That defendant not only passed and demanded, as aforesaid, in the year 1910, *an illegal raise in rates against plaintiff*, as aforesaid, but it further then and there breached plaintiff's contracts with it, as aforesaid, in that, *in passing said laws or pretended laws*, it expressly declared and announced that the Supreme Lodge of the defendant should have the right to change, increase or adjust the schedule of rates in the fourth class of defendant (in which plaintiff with his insurance aforesaid was), and which attempt to so reserve said right in

said Supreme Lodge was illegal, unauthorized, and a further breach and repudiation of plaintiff's said contracts of insurance with defendant; that not only so, but in so attempting to pass said laws of 1910, the defendant further breached its contracts of insurance with plaintiff, in that, it then and there undertook to provide and declare that members of its fourth class should have no divisible interest in the funds or properties of the insurance department of the defendant, nor be entitled to any apportionment or application of the same, which was a further breach and repudiation of plaintiff's contracts of insurance." (Printed record, pp. 5, 6, and 7.)

These allegations were followed by appropriate allegations of the forfeiture by this defendant of the policy on account of the fact that defendant in error refused to pay the increased rates. He also prayed for the recovery of all premiums paid to the old corporation, the unincorporated society, and the defendant, with interest thereon from date of payment.

On March 1, 1913, defendant, plaintiff in error here, filed its amended answer, joining issue with the plaintiff on all the allegations in the amended original petition, except such as were therein specially admitted. Its answer in part was as follows:

"For further and special answer to plaintiff's petition, defendant denies that it ever issued or executed or became responsible for the certificate sued on in this case by the plaintiff." (Printed record, p. 17, subdivision (7), first three lines.)

Again, "Defendant specially denies that it ever

in any manner, in *writing or otherwise*, assumed the payment of the certificate sued on in this case, as alleged in plaintiff's petition, or has ever obligated itself in any way, binding under the law, to carry out the alleged contract made between the plaintiff and the old corporation as evidenced by the certificate alleged to have been issued by said old corporation and sued on in this case, or as evidenced by the certificate alleged to have been issued or assumed by the unincorporated society and sued on in this case." (Printed record, p. 22.)

The section of the charter of plaintiff in error relied on by the defendant in error as an assumption of the certificate sued on is Sec. 3, which reads as follows:

"That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the *present* Supreme Lodge, Knights of Pythias, mentioned in Section 1 of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time."

Plaintiff in error insisted that the assumption of the obligations of the "present" Supreme Lodge, Knights of Pythias, mentioned in that section meant the unincorporated society, and not the old corporation which had expired four years before the incorporation of defendant, plaintiff in error here.

Plaintiff in error also denied that it had ever received any of the assets of the old corporation or of the unincorporated society.

As to the authority of plaintiff in error to raise the assessments or increase the rates charged, plaintiff in error here, defendant there pleaded among other things the following:

“Defendant admits that it passed the laws hereto attached and marked ‘Exhibit B’, at the August 1910 convention of its Supreme Lodge, but defendant avers that said laws were *just, reasonable and necessary*; that it *had the authority and power to pass same*, and that said laws, by reason of the facts stated in this answer and by reason of the further facts hereinafter stated, were binding and obligatory upon plaintiff, and defendant avers that plaintiff’s failure to comply with said laws operated as a forfeiture of any rights plaintiff had under his certificate of insurance sued on in this case.”

(Printed record, p. 26.)

The defendant avers that defendant’s rights and any claim of plaintiff *are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank* of the insurance department of this defendant, and the amendments thereto adopted by this defendant, and that any obligation of this defendant to the said plaintiff under the certificate alleged to have been issued to him in this case and sued on herein, *are governed by the charter of this defendant, its laws,*

rules and regulations governing the rights of the members of the order of the Supreme Lodge, Knights of Pythias, or amendments thereto adopted by this defendant.

The defendant alleges that under the constitution, laws, rules and regulations of this defendant, under which it was acting at the time it was incorporated, and under which it has acted since its organization as a corporation, the right *was and is expressly given* the defendant *to increase its rates of assessments*, and the rates of assessments levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the Endowment Rank or insurance department of this defendant, unless otherwise provided for by the Supreme Lodge or board of control of the Endowment Rank of the Knights of Pythias. In other words, *that by the charter*, laws and regulations adopted by this defendant since its incorporation and under which *it was acting when it became incorporated*, and under which the said unincorporated society was acting at the time plaintiff became a member and *at the time this defendant was incorporated, the express right was given and retained by said unincorporated society, and by this defendant*, all of which were acquiesced in and ratified by the plaintiff, *to increase rates of assessments on any certificate issued by this defendant or by said unincorporated society, or for which this defendant or said unincorporated society might in any way become responsible for the pay-*

ment of, either express or implied. (Printed record, pp. 21, 22.)

Defendant further avers that *the charter* of said corporation known as The Supreme Lodge of the Knights of Pythias of the World, expired by limitation on or about May 5, 1890, and that from said date up to about June 29, 1894, no corporation existed, but a society known as The Supreme Lodge of the Knights of Pythias acted as a fraternal insurance company without any charter and without being a corporation until on or about June 29, 1894. That under the laws existing when said unincorporated society began acting as a fraternal insurance company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, express power was given to and existed in said unincorporated society and its supreme governing body to change and amend its laws and to change and raise the rates of assessments; * * * That in the year of 1894 this defendant, the Supreme Lodge, Knights of Pythias, was incorporated as above alleged, by an Act of Congress approved by the President June 29, 1894. That subsequently, in the year of 1900, said act of incorporation of this defendant was amended, and that subsequently in 1907 said act of said incorporation was further amended by the Congress of the United States and that this defendant has been acting under said acts of incorporation and amendments thereto since said date of its incorpora-

tion. That under the acts of incorporation of this defendant and amendments thereto, express power was given to change and amend its by-laws, rules and regulations and that such rights were also given and clearly set forth and defined in the constitution, laws and regulations of the supreme governing body of this defendant. (Printed record, p. 20.)

The section of the charter upon which defendant based its right to raise the rates reads as follows:

“Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the nited States or of any State.”

Sec. 5 fixes the character of insurance which it should conduct. It reads as follows:

“That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.”

Defendant averred that if it ever received any dues and assessments from defendant in error it was under the following circumstances:

“If it did receive such dues, assessments or payments, * * * it did so upon obligation both express and implied upon the part of the plaintiff that he would *comply with the laws in force, existing and subsequent* to the time this defendant was incorporated as aforesaid, whether those laws were the laws adopted by the unincorporated society or by

this defendant. That plaintiff, before and since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws, *and under which it operated at the date of its incorporation*, and adopted by it from time to time, or with notice thereof, expressed or implied. That frequently since this defendant became a corporation, the plaintiff dealt with it as such in paying assessments upon certificate or certificates issued to plaintiff by either the former corporation or said unincorporated society, this defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases of his rates of assessments both by the unincorporated society and by this defendant, and paid the same and has paid special assessments previously required of him, both by said unincorporated society and by this defendant under his certificate of insurance sued on in this case. * * * That plaintiff, by his acts, *has acquiesced in and ratified by his conduct* and action the rights of this defendant and the rights of said unincorporated society *to so amend the laws as to the rate of assessments*, and that by such action the plaintiff had waived all objection to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained of by the plaintiff, were and are binding upon the plaintiff."

(Printed record, pp. 20 and 21.)

The defendant avers that defendant's rights and any claim of plaintiff are governed *by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank* of the insurance department of this defendant, and the amendments thereto adopted by this defendant. (Printed record, p. 21.)

Defendant avers that at the time of the increase of rates by this defendant, complained of by the plaintiff, the same was necessary by reason of the fact that *defendant's income was not sufficient to meet the liabilities accrued and to accrue under fourth class certificates issued to various members of its insurance department, and that in order to protect said certificate of plaintiff and all other certificates in said fourth class, and in order to promote and protect its own existence, this defendant was compelled to raise its rates, and that such rates were in contemplation of the parties under contract sued on.* (Printed record, p. 25.)

Defendant avers that plaintiff's application upon which he obtained the certificate sued upon in this case, contained a provision whereby the insured *agreed that he would be governed by and the contract of insurance should be controlled by the laws and regulations enacted by the corporation issuing said certificate governing said rank then in force or that might be thereafter from time to time enacted by the Supreme Lodge, or submit to the penalties therein contained.* (Printed record, p. 24.)

Defendant avers that when it became a corporation and received dues, assessments or payments from the plaintiff in this case, it did so upon the obligation *both express and implied*, upon the part of the plaintiff, that he would comply with its laws in force, *existing at and subsequent* to the time this defendant was incorporated as aforesaid. That the defendant would not have received said premiums, *and had no authority to receive them upon any other basis*. The plaintiff, since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws adopted by it from time to time, or with notice thereof, express or implied. (Printed record, bottom p. 14 and top of p. 15.)

Defendant also alleged in its amended answer, among other things, the following:

“That members of the Endowment Rank, of said old incorporation, said unincorporated society and of this defendant and of the insurance department of this defendant, occupied and always have occupied a dual position, each of said members being the insured on the one hand, and as such entitled to the benefits conferred upon them by their contracts, and each of said members of said old corporation, said unincorporated society and of this defendant being on the other hand insurers, and as such bound to comply with all of the laws of said respective associations and to contribute to that end and into their respective funds, a sufficient amount to enable them and each of them to carry out the con-

tracts made with its members, or for which they might become liable to its members.

Defendant avers that occupying such dual position which plaintiff occupied towards said corporations and said unincorporated society, the plaintiff is bound under the laws and regulations of same to contribute as required by same any and all amounts made necessary in order to enable said associations and corporations to carry out the contracts with its members, which contracts plaintiff was as much obligated to carry out as was either of the other members of each of said societies or corporations, and it would be inequitable and unjust for this plaintiff to be permitted to recover from this defendant contributions or the value of his certificate, when he as an insurer, together with all of the other members of said fraternal association, is obligated to make such payments for the purpose of carrying out contracts entered into by said association with its respective members, plaintiff being one of the members, who had promised to pay certificates for which said association might become liable."

(Printed record, bottom p. 22, and top of p. 23.)

On the trial of the case there was no evidence offered that plaintiff in error, defendant in the lower court, had assumed the certificates issued by the old corporation, except the section of the charter pleaded by defendant that it had assumed certain obligations of the "present" Supreme Lodge, Knights of Pythias, and the further fact that since the incorporation

of the defendant, plaintiff in error here, viz., in June, 1894, it had received the dues and assessments on the certificate issued by the old corporation in 1885. There was no evidence that the unincorporated society received any assets from the old corporation, or in any manner assumed the debts of the old corporation, unless the fact that it received dues and assessments was evidence of such assumption, or that the defendant received any assets from either the old corporation or the unincorporated society.

It was proven by W. O. Powers, the secretary who had charge of the books of the concern, as follows:

"When the present corporation was formed there was nothing to take over from the unincorporated concern. They took over its books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did ~~not~~ take over the affairs of the unincorporated Knights of Pythias."

(Printed record, bottom p. 162.)

Again, the witness says:

"None of the funds of the unincorporated society went into this new corporation."

(Printed record, p. 162.)

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There was absolutely no evidence that the old corporation turned over any assets to the unincorporated society, or to the new corporation. The testimony of Powers was the only evidence upon this point.

As to the necessity of raising the rates, that was testified to by the actuary, Mr. S. H. Wolfe, who, after he had testified that he had made a thorough examination of the affairs of the plaintiff in error, said:

"In my opinion as an actuary, it was necessary for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims.

In my opinion the action taken by the Supreme Lodge at its convention in 1910 was not only reasonable and fair, but was absolutely necessary to enable the beneficiaries to receive the amounts of the certificates when they became due. This conclusion is based upon my careful study of the assessments then being paid by the members in the fourth class, the mortality experienced by said class, and the deficiency in the funds which the the fourth class should have had in its mortuary fund if the rates were not to be increased."

(Printed record, p. 142.)

It was further shown that the mortuary fund was at that date \$675,800.85 and that it was decreasing at about \$60,000 per month.

In the application of S. Mims for membership, in 1879, he used the following language:

"I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained."

(Printed record, p. 137.)

He testified as follows:

"I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the insurance department would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase.* I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally

knew that if there were five thousand members and one died that the assessments would be *less per head on those five thousand members than it would be when the ranks had been reduced to two thousand*. As the membership decreased the death rate *increased and they would be obliged to increase the assessments* if they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, *you certainly would have to increase that rate if you met the obligations*. I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I cannot remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth."

(Printed record, p. 120, p. 121 down to Redirect examination.)

The charter of the old defunct corporation obtained the 5th of August, 1870, contained, among other things, the following provision:

"That the Supreme Lodge shall have power to alter and amend its constitution and by-laws at will."

(Printed record, p. 93.)

The certificate sued on contains, among other things, the following statement:

"This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the Certificates heretofore held by him in 1st and 2d Classes for cancellation, as requested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; *and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted* and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge, Knights of Pythias of the World to Mary J. Mims, etc. * * *

Provided, however, that if at the time of the death of said Brother, one monthly payment to the Endowment Fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endow-

ment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding equal amount of endowment. And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof."

(Printed record, pp. 98, top of p. 99.)

The case came on for trial, and the defendant, plaintiff in error here, asked the court for a peremptory instruction against the plaintiff and for itself. (Printed record, pp. 56, 57.)

That being refused, defendant asked the court to instruct the jury, as follows:

"In the event the first three special charges are not given defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and the undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant

corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates of the members of the fourth class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations to the members of the fourth class, then you are instructed to find for the defendant."

(Printed record, p. 59.)

Defendant also requested the following charge:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the fourth class of the defendant's insurance department were mutual insurers of each other's lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay these certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant."

(Printed record, bottom p. 58, top of p. 59.)

The court at the request of plaintiff's counsel, peremptorily instructed a verdict for the plaintiff

for three thousand six hundred and sixty-three and 35/100 (\$3,663.35) dollars, which the jury under directions of the court immediately returned into court. (Printed record, bottom p. 62.) For this amount the judgment was rendered. (Printed record, pp. 63, 64.) The necessary steps were then taken by motion for a new trial, assignments of error, etc., and the case was carried to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. It was there in all things affirmed. (Printed record, pp. 178, 179.) The judgment of affirmance, at a later day of the term, was modified and reduced to the sum of three thousand and fifty-two and 35/100 (\$3,052.35) dollars. (Printed record, pp. 206, 207.) Application was then made to the Supreme Court of the State of Texas for a writ of error to review the judgment of the lower court. The writ of error was refused, one of the three justices dissenting. (See bottom of p. 207.) Application was then made to Honorable Anson Rainey, Chief Justice of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, for writ of error (Printed record, pp. 108, 109, 110, and 111), which was by him granted, and the case brought here (Printed record, p. 212), plaintiff in error making the following assignments of error:

I.

The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas erred in determining and hold-

ing that the questions involved in said case and presented to it for decision were not ones of exclusive Federal jurisprudence, and making it incumbent upon that court to follow the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said court erred in holding and determining in said case that by the terms of the charter of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance upon which said Mims' suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said court erred in holding and determining that the rerating of appellee, that is to say the raising of the monthly assessments to the sum of \$34.80 per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said court erred in holding and determining in its said opinion that the rerating or raising of the monthly assessments to the sum of \$34.80 constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have authority to re-rate or raise said assessments above the amount of \$3.60 per month.

VII.

The said court erred in not holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The court erred in not holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insurance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said court erred in rendering a judgment against your petitioner for any sum whatever."

After stating many of the facts the Honorable Court of Civil Appeals disposed of the Federal questions, as follows:

"Appellant presents several assignments of error and urges many propositions thereunder in support of its contention that the trial court erred in directing the jury to return the verdict rendered. We do not regard it necessary to state and discuss seriatim the propositions contended for by appellant, and shall state, without regard to the order in which these propositions appear in the brief, our conclusions, which will sufficiently indicate the questions raised.

1. We are not aware of any authority supporting the contention of appellant that the question (or any of the questions), presented for decision to be one of exclusive 'federal jurisprudence,' and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant in this case. * * *

2. The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from appellee monthly payments of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance by it and broken. Evidently, defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the defendant's charter, which is set out in our statement of the facts, obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof."

(Printed record, p. 172.)

The provision of the constitution referred to is found on p. 171 of the printed record, and reads as follows:

"The defendant's charter granted in 1894, provides that, 'all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights

of Pythias, mentioned in Section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.' "

Again, touching the power of rerating, the court said:

"The rerating of appellee, whereby the assessments against him were so greatly increased, was, we believe, unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it."

(Printed record, p. 173.)

The court also found that:

"The plaintiff in his application for the certificates issued to him in 1879 and 1885, agreed to conform to and obey the laws, rules and regulations of the order governing the Endowment Rank of the old corporation, 'now in force, or that may hereafter be enacted, or submit to the penalties therein contained'; that the certificates issued to him were conditioned that 'in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted,' there would be paid to Mary J. Mims, plaintiff's wife, the sums therein specified, and declared that it was understood and

agreed that any violation of the mentioned conditions herein, or the requirements of the laws in force governing said rank should render the certificate void; that in the laws passed in 1884 it is provided that 'these laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias by a two-thirds vote.' "

(Printed record, p. 173.)

The court further held:

"The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him and the reservation of a general power to amend its by-laws, nor the recitation in said contract to the effect that it was issued upon the condition that the appellee paid to the endowment rank 'all monthly payments as required and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted,' authorize appellant to increase the rate of assessments as the record discloses was done. While a fraternal insurance society or association may so amend its constitution and by-laws to make 'reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implicitly by the contract itself.' And it seems clear that such a corporation may expressly reserve the right and power to increase the monthly assessments of its members, but such reservation must be so

explicitly and clearly stated in the contract itself or in some paper forming a part of the contract, that the member insured is fully advised that the terms of the contract he is entering into may be changed by the insurer in that respect. By the terms of the certificate issued to him, and the by-laws fixing the rate of his monthly assessment at the time of its issuance, which became and was a part of said contract, appellee knew what he was obligated to pay and what he was entitled to receive, and under the general reservation to amend its constitution and by-laws and the general stipulation in the contract, to the effect, that, appellee would pay all 'monthly payments as required and fully comply with all the laws governing the endowment rank,' as a condition upon which the money therein specified was to be paid to his beneficiary, no amendment materially changing and impairing the contract as made with him could be enacted or adopted that would be binding upon him."

(Printed record, p. 174.)

ANAYLSIS OF THE ASSIGNMENTS OF
ERROR EXHIBITING THE FEDERAL
QUESTIONS CONTAINED IN THE REC-
ORD WHICH WHERE DECIDED ERRON-
EOUSLY BY THE HONORABLE COURT
OF CIVIL APPEALS FOR THE FIFTH SU-
PREME JUDICIAL DISTRICT OF TEXAS,
AND AVERSELY TO PLAINTIFF.

1. The holding of the court to the effect that in construing the charter of the plaintiff in error which

it claimed conferred upon it all the power that it had exercised presented no Federal question upon which the decisions of the Supreme Court of the United States were conclusive, and in holding that Sec. 3 of the charter of plaintiff in error granted by the Congress of the United States, bound and obligated plaintiff in error to assume the policies issued by a corporation that had been defunct for four years at the date of its organization. The section of the charter reads as follows, to wit:

“Section 3. That all claims, accounts, debts, things in action, or other matters existing for or against the present Supreme Lodge, Knights of Pythias mentioned in Section ‘1’ of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitation of time.”

(Printed record, p. 179.)

2. In holding that there was any evidence other than Section 3 of the charter mentioned in the preceding paragraph sufficient to support the judgment of the court to the effect that plaintiff in error had assumed the contract of the old corporation.

3. In holding that Section 4 of the charter granted to plaintiff in error by the Federal Congress did not authorize it to raise the rates by by-laws properly passed whenever necessary to enable

it to meet its obligations, said section reading as follows:

“That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State.”

The error in this last ruling is more conspicuous by the fact that the provision in the charter of the old corporation which issued the certificate sued on, and which was adopted by authority of the Federal Congress in express terms said:

“That the said Supreme Lodge shall have power to alter and amend its constitution and by-laws at will,” (Printed record, p. 99.)

and in view of the fact that in joining the organization in 1879 he agreed as follows:

“I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be *governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or submit to the penalties therein contained,*”

and further in view of the fact that he testified that he understood that it would be probably necessary to have the rates increased, and particularly in view of the fact that the certificate sued on contained the

further provision that it was issued in consideration of the payment hereafter to said Endowment Rank of all monthly payments *as required* and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws, and in that the court refused to instruct the jury upon request of the defendant, plaintiff in error here, that the defendant had no authority under its charter to assume the indebtedness evidenced by the certificate sued on, except upon the compliance of the plaintiff that all of the by-laws in force at the date of its organization, or that it might thereafter pass.

POINTS OF LAW AND ARGUMENT.

The questions of jurisdiction in this case cannot be determined without looking into the merits of the controversy. For example, the defendant in error, plaintiff in the state court, based his suit upon the contract issued by a corporation that had not been in existence for four years before the plaintiff in error was created. He then alleges that by the terms of the plaintiff in error's charter granted to it by an act of the Congress of the United States, plaintiff in error assumed the obligations of his contract issued to him by the defunct corporation. This, plaintiff in error denies. That issue necessarily presents a Federal question. We are not unmindful of the general rule that this court will not re-examine questions of fact decided by state courts. This, however, has its limitation. Whenever it is necessary to determine the jurisdiction of this court the facts will be examined.

Klinger v. State of Missouri, 13 Wall.
257-263;

Wilson v. Oliver, 12 Howard 110;

Mississippi, etc., R. Co. v. Rock, 4 Wall.
177;

Johnson v. Risk, 137 U. S. 300.

The Honorable Court of Civil Appeals intimated that there was other evidence in the record tending to prove the assumption of the contract by the plaintiff in error, to wit, that the plaintiff in error took over the assets of the old corporation and the unin-

corporated society. There is no evidence in the record of any such fact. If this rested upon a conflict in the testimony the matter would not be brought to the attention of this court, but there being no evidence to support that conclusion, we submit that the matter becomes a question of law for this court to determine. That question cannot be determined without examining the record.

The court also intimated that the evidence showing that plaintiff in error had collected dues and assessments of the defendant in error since the date of its incorporation was evidence of its assumption of the original contract. This is denied, and we submit that as a matter of law well settled by the Supreme Court of the State of Texas, such facts are not evidence of the assumption of the contract.

Eddy & Cross, Receivers, v. A. M. Hinnant, 82 Tex. 354, 356.

In the case last cited the question arose in this way: the East Line Railroad, a corporation in Texas, had entered into a contract with Hinnant giving him free passage over its railway as a part of the consideration for its right of way. The East Line sold its road to the Missouri, Kansas & Texas Railway Company. Hinnant sought to enforce his obligation against it as a succeeding owner of the corporation, and compel it to carry him free. In discussing that the Supreme Court used the following language:

“If it be admitted that the East Line Company sold and conveyed its railway and other

property to the Missouri, Kansas & Texas Company, as far as it was in the power of the one to buy and of the other to sell, yet in our opinion it does not follow that the plaintiff could recover in this case. The contract made by the brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this state he had a right of action for its breach against the company with whom it was made. But in order to show a right of action in the present case, *it was necessary for the plaintiff to prove not only that the Missouri, Kansas & Texas Company bought the East Line Railway, but also that it assumed the obligations of the East Line Company, or at least promises to perform the particular contract upon which the action in this case is based.* If A sell B a tract of land upon which a vendor's lien exists in favor of C, the land may be subjected to the payment of the debt; but B is not liable upon the contract for the purchase money, unless in his contract with A he has assumed to pay it, nor would any recognition of the promise of A to pay C the purchase money or any part payment upon it make him liable personally upon it. And so with the Missouri, Kansas & Texas Railway Company and its receivers in this case. They could respect *the contract of the East Line & Red River Railway Company as long as they desired*, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited *the title to the right of way and to the other property conveyed by*

B. C. Hinnant and his wife to the East Line Company; still, they were not responsible *in damages for the failure to carry it out.*"

Eddy & Cross v. Hummel, 82 Texas 354;
Hutchinson v. R. R., 111 S. W. 1106.

It is impossible for defendant, plaintiff in error here, to have assumed the obligation of the old corporation by any of the means suggested by the Court of Civil Appeals. The assumption to be binding must have been in writing. Art. 3956, R. S. of the State of Texas, 1911, reads as follows:

"Article 3965. (2543) (2464.) Written Memorandum Required to Maintain Certain Actions. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized:

1. To charge any executor or administrator upon any promise to answer any debt or damages due from his testator or intestate, out of his own estate; or,

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another."

It is not pretended that there was any written assumption of the debt of the old corporation by the plaintiff in error.

It is evident, therefore, that the provision of the

charter was the controlling question. If the court agrees with us in the foregoing, then the decision of the motion to dismiss must at least be postponed until the case shall have been submitted on its merits.

Lynch v. Bernal, 131 U. S. Appx. XCIV;
19 L. Ed. 395;
The Utah, 12 Wall. 136;
Sparrow v. Strong, 3 Wall. 97;
Bohannon v. Nebraska, 118 U. S. 231.

But if this court should determine that the Honorable Court of Civil Appeals having based its decision on other facts, as well as the Federal statute, and that this Court will not look into the existence or non-existence of those facts, then we submit that it will be necessary for the court in deciding the other Federal questions to look into the record, in this that the defendant in error, plaintiff below, alleged that the rates and assessments on his certificate were raised in 1910 by the plaintiff in error illegally and without authority. The defendant, plaintiff in error here, denies that it raised the rates without authority and illegally, but alleged that the authority to raise the rates and assessments was conferred on it by its charter which was an act of the Congress of the United States. It contends that its charter gives it the right to amend its constitution and by-laws at pleasure, and therefore gives it the right to raise the rates whenever necessary to meet its liabilities.

It further averred that the old corporation which

issued the certificate sued on had a similar provision in its charter which was organized under and by virtue of an act of the Congress of the United States. It will then become necessary for the court to look into the record, and determine whether or not the Federal charter of plaintiff in error authorized it to raise the rates and assessments under all the facts and circumstances surrounding the order at the date when the increase complained of was made.

The part of the record necessary to be examined will be:

1. The section of plaintiff in error's charter authorizing it to amend its constitution and by-laws.
2. The section of the charter of the old corporation conferring upon it similar powers.
3. The promise and obligation of the defendant in error when applying for membership in the old corporation that he would punctually pay all dues and assessments for which he might become liable, and that he would be governed, and his contract should be controlled, by all the laws, rules and regulations of the order governing this rank that were then in force, or that might thereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, and the certificates which were issued to him and upon which this suit was brought, containing a similar promise of obligation to pay all dues and assessments that may be required, and to obey all the by-laws then in existence or that might thereafter be passed by the Supreme Lodge, Knights of

Pythias. Until the court shall have examined these stipulations it may find it more difficult to determine what power was conferred by its charter over the contract upon which plaintiff brought this suit.

If, however, the court shall determine to consider this motion before the case shall be reached for submission in the ordinary course, we submit the following propositions:

1. *That plaintiff's (defendant in error here) allegations in his petition that Section 3 of defendant's charter granted by the act of the Congress of the United States requiring it to assume the obligations of the present Supreme Lodge, Knights of Pythias, constituted an assumption on its part of the obligations of the old, defunct corporation, and its denial by plaintiff in error presents a Federal question.*

2. *The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas decided that question in favor of the defendant in error and against the plaintiff in error, and determined that by the terms of its charter granted by an act of the Congress of the United States it did assume the indebtedness evidenced by the certificate sued upon.*

3. *There being no evidence in the record, written or oral, of the assumption of the indebtedness sued on by the plaintiff in error, except Section 3 of its charter, is sufficient to show that the decision of the Honorable Court of Civil Appeals was entirely controlled by its decision of the Federal question, that is to say, by its charter granted by an act of the*

Congress of the United States, plaintiff in error had assumed the indebtedness sued upon.

We have heretofore demonstrated that the mere acceptance of dues and assessments by the plaintiff in error did not of itself constitute an assumption on the part of plaintiff in error of the obligations of the old corporation.

Eddy & Cross, Receivers v. Hinnant, 82 Tex. 354.

4. The Honorable Court of Civil Appeals erroneously decided that Section 3 of plaintiff in error's charter obligated it to assume the certificate sued on, which was issued by the old corporation in 1885, nine years before the creation of the defendant.

The language of the section relied on by defendant in error being that "all claims, accounts, debts, things in action or other matters existing for or against the *present* Supreme Lodge, Knights of Pythias mentioned in Section 1 of this act shall survive and succeed," etc. What was meant by the language "present Supreme Lodge, Knights of Pythias mentioned in Section 1? Section 1 says that the officers and members of the Supreme Lodge, Knights of Pythias, and their successors be and they are hereby incorporated and made a body politic and corporate in the District of Columbia by name the Supreme Lodge, Knights of Pythias. It is too plain for argument that the *present* Supreme Lodge, Knights of Pythias, was the unincorporated society, because that was what was proposed to be incorpo-

rated. It would be absurd to say that the Congress intended by the words "present Supreme Lodge, Knights of Pythias," to mean a corporation that had ceased to exist for more than four years. Would anyone say that the words "present Governor of Texas" written today would be interpreted to mean the man who ceased to be Governor four years ago, and who was actually dead and buried for that period of time? If Congress should pass an act referring to the present Chief Justice of the Supreme Court of the United States, would anyone suppose that Congress meant the distinguished jurist who was Chief Justice four years ago, but is now deceased?

If an individual who has been twice married, did on the date of his second marriage and after his marriage speak of his present wife, would anyone understand him to mean that it was his wife who had died four years before? And yet, that is what the Honorable Court of Civil Appeals of Texas held that the Congress of the United States meant by the words "present Supreme Lodge, Knights of Pythias"—that the Congress meant the old Supreme Lodge incorporated, and which corporation had ceased to exist four years before the statute in question was passed.

5. The Honorable Court of Civil Appeals in holding that the rating by plaintiff in error by which his assessments were so greatly increased, was unauthorized and constituted such repudiation or breach of defendant in error's contract of insur-

ance as entitled him to recover in this action the sums paid upon his certificate, is in effect holding that the charter of plaintiff in error granted by act of the Congress of the United States which provided that said corporation shall have a constitution and shall have power to amend same at pleasure, provided that such constitution and amendments thereto did not conflict with the laws of the United States or of any State, did not confer upon it the power to raise the rates charged plaintiff, defendant in error here, as it did by its by-laws passed in 1910, notwithstanding the fact that plaintiff had in applying for membership in the old corporation, and in accepting the certificate sued upon, agreed that he would obey all the laws in existence or that might thereafter be enacted.

It is impossible to conceive how the Honorable Court of Civil Appeals could have decided the above proposition without deciding a Federal question. And whether plaintiff be right or wrong in his contention, that it did by its charter assume the contract sued on, it is wholly immaterial so far as this motion is involved, because the court held clearly and emphatically that the charter of the plaintiff in error did not confer on it the power to raise its rates. If it did confer the power to raise the rates plaintiff's judgment must necessarily be reversed. It cannot be said that that decision was based on any other proposition than the one of authority of defendant to raise the rates.

6. The section of the charter authorizing the de-

fendant to amend its constitution and by-laws, provided they did not conflict with the laws of the United States or of any State, conferred on the defendant under the circumstances of this case full authority to increase its rates when necessary to meet its obligations.

Union Pacific R. Co. v. Myers, 115 U. S. 1, 25;

Messer v. Ancient Order United Workmen, 180 Mass. 321;

Wineland v. Knights of the Maccabees, 148 Mich. 608;

Williams v. Supreme Council, C. M. B. A., 152 Mich., 1;

Reynolds v. Royal Arcanum, 192 Mass. 150;

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409;

Barbot v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681;

Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208;

Richmond v. Supreme Lodge Order of Mutual Protection, 100 Mo. App. 8;

Miller v. National Council K. & L. of S., 69 Kan. 234;

Woodmen of the World v. Woods, 34 Colo. 1;

Shepperd v. Bankers' Union of the World, 77 Neb. 85;

Connor v. Golden Cross, 117 Tenn. 549;

Champion v. Hannahan, 138 Ill. App. 387;

Pierce v. Bankers' Union, 140 Ill. App. 495;

Mock v. Supreme Council Royal Arcanum, 121 App. Div. (N. Y.) 474;
 Fullenwider v. Supreme Council, Royal League, 73 Ill. App. 321, 331;
 Fullenwider v. Supreme Council, Royal League, 180 Ill. 621;
 Williams v. Supreme Council, 152 Mich. p. 1;
 Bartrum v. Royal Arcanum, 6th Ont. W. R. 404;
 Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150;
 Hayden v. Mutual Reserve Fund Life Ass'n, 98 Fed. 200;
 Hayden v. Mutual Reserve Fund Life Ass'n, 104 Fed. 718.

7. The defendant in error having acquiesced in these changes is estopped from denying the authority of plaintiff in error to make them.

Wineland v. Knights of the Maccabees, 148 Mich. 608;
 Gibbs v. K. of P., 156 S. W. (Mo.) 11;
 Manning v. San Antonio Club, 63 Tex. 66;
 29 Cyc. 70.

8. Plaintiff in error must be the exclusive judge of the necessity of changing the rates.

Knights of Pythias v. King, 20 N. E. 483;
 Corn v. Ins. Co., 6 Cranch. 192;
 Wright v. Minnesota Mutual Life Ins. Co., 193 U. S. 657.

9. The court should have held that the plaintiff in error was without power under the terms of its char-

ter to assume the indebtedness sued on, except on the basis that the defendant in error should subordinate himself to its laws when he became a part of its lodge.

10. It is a well settled rule that when an old corporation issues a policy or certificate of insurance as was done in this case, and then a new corporation is organized and receives the dues of the old certificates issued by its predecessor, the obligation thus existing by reason of dues received must be measured and the liabilities must be fixed by the laws of the new corporation. The law of the new corporation in this instance being a Federal charter by which its power must be measured, presented a Federal question which the state courts could not evade.

Bollman v. Supreme Lodge, Knights of Honor, 53 S. W. 722—a Texas case in which a writ of error was refused by the Supreme Court. (See 54 S. W. 246);

Wineland v. Knights of the Maccabees, 148 Mich. 608;

Gibbs v. K. of P., 156 S. W. (Mo.) 11.

Any liability under the certificates of the old corporation must be treated as if it were a liability under a certificate of the new corporation, and limited and controlled by the new corporation's charter.

Watson v. N. L. Trust Company, 189 Fed. p. 872;

Niblack Benefit Society and Accident Ins. (2d ed.) §18, pp. 33, 34.

29 Cyc. 70.

The plaintiff in error was chartered by an act of Congress.

28 Stat. at Large, 96, 97.

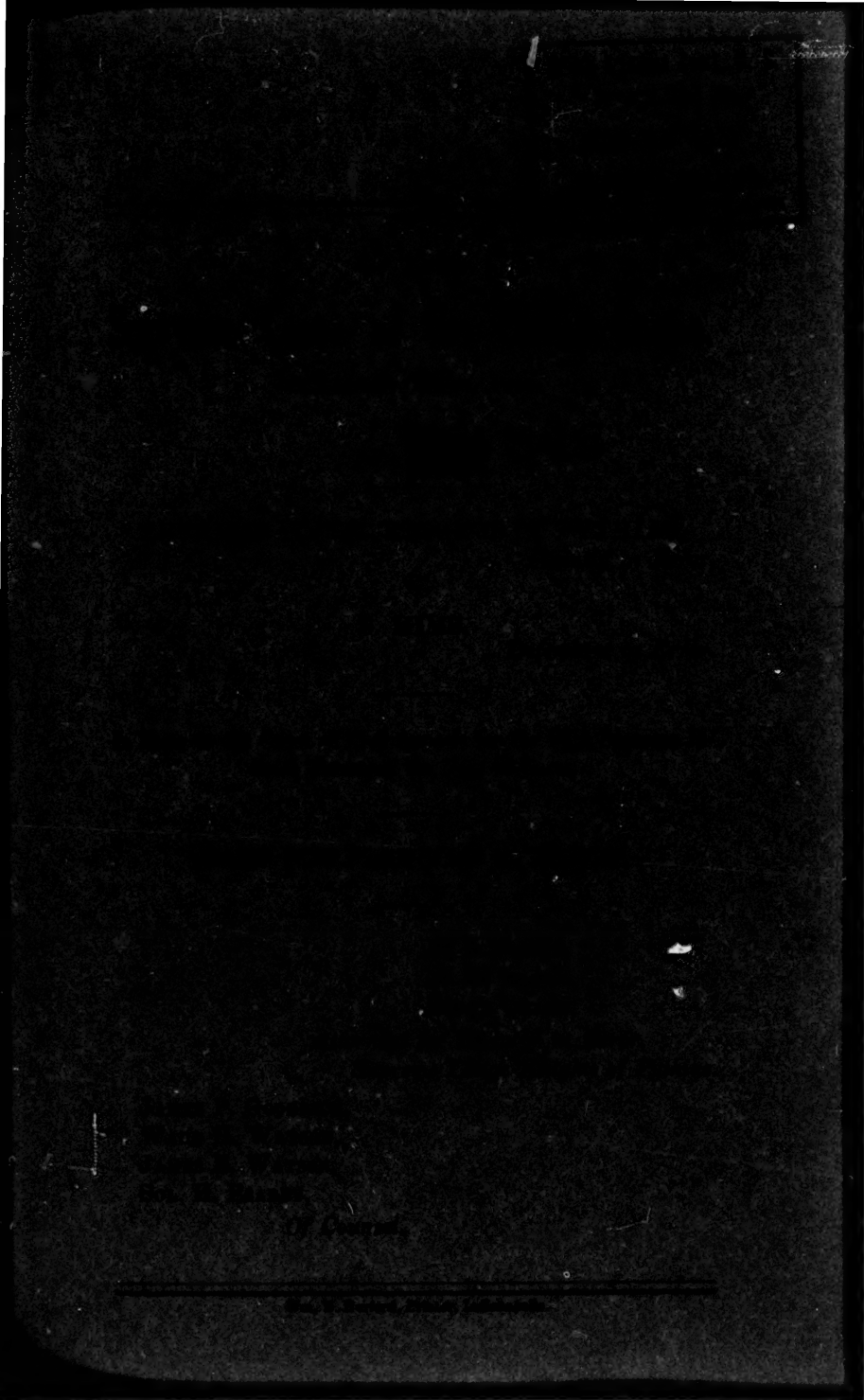
Its purpose was to provide insurance to its members at cost—"said corporation shall not engage in any business for gain." To engage in such business at *less* than cost meant irreparable ruin to many of the members. To engage in such business *at cost* is fair to every member. Express power was given to amend the constitution and by-laws "at pleasure." It is generally held that a corporation has an inherent right to amend its by-laws. But here is an express statutory right. This right is not in any sense restricted. It is general. The judgment of the Honorable Civil Court of Appeals has restricted this right in a manner that inevitably tends to either the destruction of the society, or to giving the members residing in the State of Texas an unconscionable advantage over the members residing in the other States, and this must be held as flowing from the one Federal statute chartering this society. It is quite unthinkable that Congress and the President consciously gave their high sanction to a statute capable of such a construction. Our deep conviction is that a Federal statute means the same thing wherever Federal power is enforceable and wherever Federal jurisdiction extends. Would it not be anomalous that as members of the same benevolent society created by a statute of the United States, a

member in Vermont could be compelled to pay a sum sufficient to pay the death losses, while a member from Texas could compel the payment of a death loss upon payment of one-fourth the cost thereof? Federal power is uniform. United States statutes do not bear one construction in Rhode Island and a different construction in California. They operate exactly alike on all regardless of race, color, or residence. If Federal statutes may be finally and conclusively construed by our State Supreme Courts, and they differ as to the construction thereof, or as to the rights of the parties thereunder, the States may indirectly render Federal statutes nugatory. Section 237 of the Judicial Code provides that "where any title, right, privilege, or immunity is claimed under * * * the statute of * * * the United States," a writ of error will lie to the Supreme Court of the United States. The evident purpose underlying this statute is to provide a method of enforcing uniformity of Federal power and construction. Without such a method of applying Federal power, Federal statutes would largely be rendered nugatory. It is conceivable that a State court could declare a Federal statute invalid, but it is not worthy of serious consideration that if the Federal government is to endure, the Supreme Court of the United States must be given the right finally to interpret and to enforce Federal constitutions, treaties, statutes and relations. The question here presented is of momentous importance not only to the plaintiff

in error, but to the relationships of citizens to Federal power and Federal rights.

We respectfully ask that the motion to dismiss be overruled.

CRANE & CRANE,
H. P. BROWN,
JAMES P. GOODRICH,
SOL. H. ESAREY,
JAMES E. WATSON,
WARD H. WATSON,
Attorneys for Plaintiff in Error.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1914.

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

v.

S. MIMS,
Defendant in Error.

In Error to the Court of Civil Appeals for the Fifth Supreme Ju-
dicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Defendant in error, as plaintiff in the District Court of Dallas County, Texas, filed a suit May 19, 1911, (Printed record, pp. 1 and 4) against plaintiff in error as defendant, alleging that it was a corporation organized under the laws of some State other than Texas, and engaged in the life insurance business, further alleging that it had issued to him a policy in 1879, and that thereafter, on May 29, 1885, had exchanged it for one for three thousand dollars, issued to his wife as beneficiary. (Printed record, p. 1.)

On February 14, 1913, plaintiff filed an amended petition in lieu of his original petition, in which he materially changed his allegations. He then alleged that in the year 1870 there was incorporated under a general law enacted by the Congress of the United States a certain insurance order or company, the "Supreme Lodge, Knights of Pythias", otherwise known and frequently denominated thereafter as "Supreme Lodge, Knights of Pythias of the World"; that by the express terms of the general law of the Congress under which said corporation was incorporated, the life of said corporation expired in the year 1890; that said company continued after its incorporation down to the time of its death by law, or expiration of its charter in said year 1890, to engage in the business of life insurance, issuing policies of insurance upon the lives of persons; that on April 11, 1879, plaintiff obtained from said company a written policy of insurance or benefit certificate insuring plaintiff's life in favor of a beneficiary or beneficiaries therein named; that afterwards, on May 29, 1885, said corporation so issuing said policy issued and delivered to plaintiff in lieu of said former insurance policy another written policy of insurance or benefit certificate, wherein and whereby it obligated itself to pay to plaintiff's wife, Mary J. Mims, the sum of three thousand dollars (\$3,000.00) upon notice and proof of plaintiff's death in good standing at the time of his death in what was denominated and known as the "Endowment Rank" of said corporation, said benefit

certificate further stipulating and providing that if, at plaintiff's death, one monthly payment to the Endowment Fund by members holding an equal amount of endowment (meaning an equal amount of endowment to that of plaintiff) should not be sufficient to pay the amount of endowment held by plaintiff (meaning his \$3,000.00), that the benefit to be paid upon such insurance policy in case of plaintiff's death should be a sum equal to one payment to the said Endowment Fund by each member holding an equal amount of endowment. That plaintiff continued carrying his said policies with said company until the expiration of its existence by terms of law, as aforesaid, whereupon the officials in charge of the affairs of said company at its decease, and their successors, continued thereafter for a period of several years, and until the incorporation of the defendant herein in the year 1894, to take and acquire and remain in possession of the assets of said deceased company, and to continue and carry on as formerly, its business as an unincorporated association, but still under the name "Supreme Lodge, Knights of Pythias", or "Supreme Lodge, Knights of Pythias of the World"; that thereupon, and thereafter, and in the year 1894, the defendant herein, the "Supreme Lodge, Knights of Pythias" was incorporated under a special act of the Congress of the United States, since which time said defendant has continued to be, and is now a corporation duly incorporated and engaged in the business of life insurance, issuing policies of insurance upon the lives of

persons; that by the express terms and conditions of the charter of the defendant company it was provided and stipulated that

“all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in section one of this act, shall survive and succeed to and against the body, corporate and politic, hereby created,”

whereby it was expressly stipulated and provided that the defendant in accepting its charter should undertake and obligate itself in all respects to carry out the terms of all insurance policies of the former corporation aforesaid, or of said unincorporated association. Furthermore, plaintiff avers, and shows the fact to be, that the defendant at all times since its corporation, has accepted dues, payments and premiums from the plaintiff, and in all respects bound itself in law and in fact, to carry out plaintiff's said contracts of insurance. The defendant acquired and took over all the assets of said former corporation and of said unincorporated association.

That at all times plaintiff was and remained a member in good standing of the Endowment Rank of said corporation which issued said policies, and in all respects continued and remained in good standing in both of the corporations and unincorporated association mentioned herein, and continued at all times to carry out and comply with all the terms

and conditions of this insurance aforesaid, and desired and expected to continue to do so, notwithstanding which fact the defendant herein, while plaintiff's said insurance was in full force and effect, did on or about August 2, 1910, through its Supreme Lodge, being its supreme governing body, wrongfully and illegally passed and promulgated and put into force, certain pretended laws or amended laws, wherein and whereby the defendant demanded and required of plaintiff that plaintiff should, beginning with the month of January, 1911, pay the defendant the large sum of \$34.80, monthly dues and assessments, as a condition precedent to the recognition and maintenance of plaintiff's insurance with defendant, whereas theretofore defendant was requiring of plaintiff the payment of only \$7.35 dues and assessments, per month, as a condition precedent to the recognition and maintenance of said policies, and certainly was not authorized in law to exact more than said last mentioned sum, and not even that amount, as it was a part and condition of plaintiff's contracts of insurance as aforesaid, that the monthly rate of assessment to be paid by plaintiff should never at any time exceed the amount of, to wit, \$3.60 per month, by virtue of the fact that there was established in the year 1884 what was known and denominated as the Fourth Class of the Endowment Rank of said first incorporated company, as aforesaid, and it was expressly provided by the constitution or by-laws of said company, which provisions became and were a part of

plaintiff's contracts of insurance aforesaid, that the Endowment Rank, for the payment of benefits in said Fourth Class should be derived from monthly payments by each member (of which plaintiff was one), said payments to be for each one thousand dollars of endowment, and to be graded according to the age of the member at the time of making application (meaning his application for membership in said Endowment Rank) and his expectancy of life, the age to be taken at the nearest anniversary of his birthday; that the monthly payments should be based upon the average expectance of life of the applicant, and should continue the same so long as his membership continued, by reason of the monthly assessment rate to be paid by plaintiff upon his said \$3,000.00 of insurance was expressly limited and agreed never to exceed said sum of, to wit, \$3.60 per month.

That defendant not only passed and demanded, as aforesaid, in the year 1910, an illegal raise in rates against plaintiff, as aforesaid, but it further then and there breached plaintiff's contracts with it, as aforesaid, in that, in passing said laws or pretended laws, it expressly declared and announced that the Supreme Lodge of the defendant should have the right to change, increase or adjust the schedule of rates in the fourth class of defendant (in which plaintiff with his insurance aforesaid was) and which attempt to reserve said right in said Supreme Lodge was illegal, unauthorized, and a further breach and repudiation of plaintiff's said

contracts of insurance with defendant; that not only so, but in so attempting to pass said laws of 1910, the defendant further breached its contract of insurance with plaintiff, in that, it then and there undertook to provide and declare that members of its Fourth Class should have no divisible interest in the funds or properties of the insurance department of the defendant, nor be entitled to any apportionment or application of the same, which was a further breach and repudiation of plaintiff's contracts of insurance. (Printed record, pp. 5, 6 and 7.)

These allegations were followed by appropriate allegations of the forfeiture by this defendant of the policy on account of the fact that defendant in error refused to pay the increased rates. He also prayed for the recovery of all premiums paid to the old corporation, the unincorporated society, and the defendant, with interest thereon from date of payment.

On March 1, 1913, defendant, plaintiff in error here, filed its amended answer, joining issue with the plaintiff on all the allegations in the amended original petition, except such as were therein specially admitted. Its answer in part was as follows:

"For further and special answer to plaintiff's petition, defendant denies that it ever issued or executed or became responsible for the certificate sued on in this case by the plaintiff." (Printed record, p. 17, subdivision (7), first three lines.)

Again defendant specially denies that it ever in any manner, in writing or otherwise, assumed the payment of the certificate sued on in this case, as alleged in plaintiff's petition, or has ever obligated itself in any way, binding under the law, to carry out the alleged contract made between the plaintiff and the old corporation as evidenced by the certificate alleged to have been issued or assumed by the unincorporated society and sued on in this case. (Printed record, p. 22.)

The section of the charter of plaintiff in error relied on by the defendant in error as an assumption of the certificate sued on is Section 3, which reads as follows:

“That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in Section 1, of this Act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.”

Plaintiff in error insisted that the assumption of the obligations of the “present” Supreme Lodge, Knights of Pythias, mentioned in that section meant the unincorporated society, and not the old corporation which had expired four years before the incorporation of defendant, plaintiff in error here.

Plaintiff in error also denied that it had ever received any of the assets of the old corporation or of the unincorporated society.

As to the authority of plaintiff in error to raise the assessments or increase the rates charged, plaintiff in error here, defendant there, pleaded among other things the following:

“Defendant admits that it passed the laws hereto attached and marked “Exhibit B”, at the August 1910 convention of its Supreme Lodge, but defendant avers that said laws were just, reasonable and necessary; that it had the authority and power to pass same, and that said laws, by reason of the facts stated in answer and by reason of the further facts hereinafter stated, were binding and obligatory upon plaintiff, and defendant avers that plaintiff’s failure to comply with said laws operated as a forfeiture of any rights plaintiff had under his certificate of insurance sued on in this case.”

(Printed record, p. 26.)

The defendant avers that defendant’s rights and any claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the insurance department of this defendant, and the amendments thereto adopted by this defendant, and that any obligation of this defendant to the said plaintiff under the certificate alleged to have been issued to him in this case and sued on herein, are

governed by the character of this defendant, its laws, rules, and regulations governing the rights of the members of the order of the Supreme Lodge, Knights of Pythias, or amendments thereto adopted by this defendant.

The defendant alleges that under the constitution, laws, rules and regulations of this defendant, under which it was acting at the time it was incorporated, and under which it has acted since its organization as a corporation, the right was and is expressly given the defendant to increase its rates of assessments, and the rates of assessments levied as expressly stipulated in its laws to be in force and effect so long as a member remained a member of the Endowment Rank or insurance department of this defendant, unless otherwise provided for by the Supreme Lodge or Board of Control of the Endowment Rank of the Knights of Pythias. In other words, that by the charter, laws and regulations adopted by this defendant since its incorporation and under which it was acting when it became incorporated, and under which the said unincorporated society was acting at the time plaintiff became a member and at the time this defendant was incorporated, the express right was given and retained by said unincorporated society, and by this defendant, all of which were acquiesced in and ratified by the plaintiff, to increase rates of assessments on any certificate issued by this defendant or by said unincorporated society, or for which this defendant or said unincorporated society might in any way be-

come responsible for the payment of, either express or implied. (Printed record, pp. 21, 22.)

Defendant further avers that the charter of said corporation known as The Supreme Lodge of the Knights of Pythias of the World, expired by limitation on or about May 5, 1890, and that from said date up to about June 29, 1894, no corporation existed, but a society known as The Supreme Lodge of the Knights of Pythias acted as a fraternal insurance company without any charter and without being a corporation until on or about June 29, 1894. That under the laws existing when said unincorporated society began acting as a fraternal insurance company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, express power was given to, and existed in, said unincorporated society and its supreme governing body to change and amend its laws and to change and raise the rates of assessments; * * * That in the year of 1894 this defendant, The Supreme Lodge, Knights of Pythias, was incorporated as above alleged, by an Act of Congress approved by the President June 29, 1894. That subsequently, in the year of 1900, said act of incorporation of this defendant was amended, and that subsequently in 1907 said act of said incorporation was further amended by the Congress of the United States and that this defendant has been acting under said acts of incorporation and amendments thereto since said date of its incorporation.

That under the acts of incorporation of this defendant and amendments thereto, express power was given to change and amend its by-laws, rules and regulations and that such rights were also given and clearly set forth and defined in the constitution, laws and regulations of the supreme governing body of this defendant. (Printed record, p. 20.)

The section of the charter upon which defendant based its right to raise the rates reads as follows:

“Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State.”

Section 5 fixes the character of insurance which it should conduct. It reads as follows:

“That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.”

Defendant averred that if it ever received any dues and assessments from defendant in error it was under the following circumstances:

“If it did receive such dues, assessments or payments, * * * it did so upon obligation both expressed and implied upon the part of the plaintiff that he would comply with the laws in force, existing, and subsequent to, the time this defendant was incorporated as aforesaid, whether those laws were the laws adopted by the unincorporated society or by

this defendant. That plaintiff, before and since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws, and under which it operated at the date of its incorporation, and adopted by it from time to time, or with notice thereof, expressed or implied. That frequently since this defendant became a corporation, the plaintiff dealt with it as such in paying assessments upon certificate or certificates issued to plaintiff by either the former corporation or said unincorporated society, this defendant increased and changed the rates of assessments and levied higher rates of assessments upon the plaintiff; that the plaintiff had acquiesced in such previous increases of his rates of assessments both by the unincorporated society and by this defendant, and paid the same and has paid special assessments previously required of him, both by said unincorporated society and by this defendant under his certificate of insurance sued on in this case. * * * That plaintiff, by his acts, has acquiesced in and ratified by his conduct and action the rights of this defendant and the rights of said unincorporated society to so amend the laws as to the rates of assessments, and that by such action the plaintiff had waived all objection to the exercise of such rights by this defendant, and this defendant avers that the raise in rates complained off by the plaintiff, were and are binding upon the plaintiff."

(Printed record, pp. 20 and 21.)

The defendant avers that defendant's rights and claim of plaintiff are governed by and dependent upon its charter of incorporation, rules, laws and regulations governing Endowment Rank of the Insurance Department of this defendant, and the amendments thereto adopted by this defendant. (Printed record, p. 21.)

Defendant avers that at the time of the increase of rates by this defendant, complained of by the plaintiff, the same was necessary by reason of the fact that defendant's income was not sufficient to meet the liabilities accrued and to accrue under Fourth Class certificates issued to various members of its Insurance Department, and that in order to protect said certificate of plaintiff and all other certificates in said Fourth Class, and in order to promote and protect its own existence, this defendant was compelled to raise its rates, and that such rates were in contemplation of the parties under contract sued on. (Printed record, p. 25.)

Defendant avers that plaintiff's application upon which he obtained the certificate sued upon in this case, contained a provision whereby the insured agreed that he would be governed by and the contract of insurance should be controlled by the laws and regulations enacted by the corporation issuing said certificate governing said rank then in force or that might be thereafter from time to time enacted by the Supreme Lodge, or submit to the penalties therein contained. (Printed record, p. 24.)

Defendant avers that when it became a corpora-

tion and received dues, assessments or payments from the plaintiff in this case, it did so upon the obligation both express and implied, upon the part of the plaintiff, that he would comply with its laws in force, existing at and subsequent to the time this defendant was incorporated as aforesaid. That the defendant would not have received said premiums, and had no authority to receive them upon any other basis. The plaintiff, since this defendant was incorporated, in dealing with this defendant, did so with full knowledge of its existing laws, charter and by-laws adopted by it from time to time, or with notice thereof, express or implied. (Printed record, bottom p. 14 and top of p. 15.)

Defendant also alleged in its amended answer, among other things, the following:

“That members of the Endowment Rank, of said old incorporation, said unincorporated society and of this defendant and of the Insurance Department of this defendant, occupied and always have occupied a dual position, each of said members being the insured on the one hand, and as such entitled to the benefits conferred upon them by their contract, and each of said members of said old corporation, said unincorporated society and of this defendant being on the other hand insurers, and as such bound to comply with all of the laws of said respective associations and to contribute to that end and into their respective funds, a sufficient amount to enable them and each of them to carry out the contracts made with its

members, or for which they might become liable to its members.

Defendant avers that occupying such dual position which plaintiff occupied towards said corporations and said unincorporated society, the plaintiff is bound under the laws and regulations of same to contribute as required by same any and all amounts made necessary in order to enable said associations and corporations to carry out the contracts with its members, which contract plaintiff was as much obligated to carry out as was either of the other members of each of said societies or corporations, and it would be inequitable and unjust for this plaintiff to be permitted to recover from this defendant contributions or the value of his certificate, when he is an insurer, together with all of the other members of said fraternal association, is obligated to make such payments for the purpose of carrying out contracts entered into by said association with its respective members, plaintiff being one of the members, who had promised to pay certificates for which said association might become liable."

(Printed record, bottom p. 22 and top of p. 23.)

On the trial of the case there was no evidence offered that plaintiff in error, defendant in the lower court, had assumed the certificates issued by the old corporation, except the section of the charter pleaded by defendant that it had assumed certain obligations of the "present" Supreme Lodge,

Knights of Pythias, and the further fact that since the incorporation of the defendant, plaintiff in error here, viz., in June, 1894, it had received the dues and assessments on the certificate issued by the old corporation in 1885. There was no evidence that the unincorporated society received any assets from the old corporation, or in any manner assumed the debts of the old corporation, unless the fact that it received dues and assessments was evidence of such assumption, or that the defendant received any assets from either the old corporation or the unincorporated society.

It was proven by W. O. Powers, the secretary who had charge of the books of the concern, as follows:

“When the present corporation was formed there was nothing to take over from the unincorporated concern. They took over its books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did not take over the affairs of the unincorporated Knights of Pythias.”

(Printed record, bottom page 162.)

Again the witness says:

"None of the funds of the unincorporated society went into this new corporation."

(Printed record, p. 162.)

There was absolutely no evidence that the old corporation turned over any assets to the unincorporated society, or to the new corporation. The testimony of Powers was the only evidence upon this point.

The actuary, Mr. S. H. Wolfe, testified that he had made a thorough examination of the affairs of the plaintiff in error, and said:

"In my opinion as an actuary, it was necessary for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims.

In my opinion the action taken by the Supreme Lodge at its convention in 1910 was not only reasonable and fair, but was absolutely necessary to enable the beneficiaries to receive the amounts of the certificates when they became due. This conclusion is based upon my careful study of the assessments then being paid by the members in the Fourth Class, the mortality experienced by said class, and the

deficiency in the funds which the Fourth Class should have had in its mortuary fund if the rates were not to be increased."

(Printed record, p. 142.)

He further testified as follows: the amount of the mortuary fund in the Fourth Class (being the class in question) at the end of June, 1910, was \$723,000.00. At the end of July, 1910, was \$700,930.00. (Top of p. 143 printed record.)

He further offered an exhibit showing the gradual decrease of this mortuary fund since December, 1908, which is as follows:

December 31, 1908.....	\$1,274,474
January 31, 1909.....	1,217,012
February 28, 1909.....	1,189,247
March 31, 1909.....	1,176,096
April 30, 1909.....	1,143,010
May 31, 1909.....	1,061,920
June 30, 1909.....	1,037,186
July 31, 1909.....	1,003,178
August 31, 1909.....	992,329
September 30, 1909.....	982,106
October 31, 1909.....	967,790
November 30, 1909.....	939,279
December 31, 1909.....	872,876
January 31, 1910.....	848,063
February 28, 1910.....	823,769
March 31, 1910.....	807,995
April 30, 1910.....	819,810
May 31, 1910.....	756,981
June 30, 1910.....	723,330
July 31, 1910.....	700,930

(Printed record, p. 144.)

In the application of S. Mims for membership, in 1879, he used the following language:

“I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained.”

(Printed record, p. 137.)

He testified as follows:

“I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the Insurance Department would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would

be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments if they met their obligations according to the contract; that is, on the assessment plan. I presumed that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you met the obligations. I do not remember whether they raised the rates on me in 1888 or 1901. They raised them so often that I cannot remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth."

(Printed record, p. 120, p. 121 down to Redirect Examination.)

The charter of the old defunct corporation obtained the 5th of August, 1870, contained, among other things, the following provision:

"That the Supreme Lodge shall have power to alter and amend its constitution and by-laws at will."

(Printed record, p. 93.)

The certificate sued on contains, among other things, the following statement:

“This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing the date of April 11, 1879, and his absolute surrender of the Certificates heretofore held by him in 1st and 2nd Classes for cancellation, as requested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge, Knights of Pythias of the World to Mary J. Mims, etc. * * *

Provided, however, that if at the time of the death of said Brother, one monthly payment to the Endowment Fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding equal amount of endowment held by said Brother. And it is understood

and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof."

(Printed record, pp. 98, top of p. 99.)

The case came on for trial, and the defendant, plaintiff in error here, asked the court for a peremptory instruction against the plaintiff for itself.

(Printed record, pp. 56, 57.)

That being refused, defendant asked the court to instruct the jury, as follows:

"In the event the first three special charges are not given, defendant asks the court to instruct the jury as follows:

Gentlemen of the Jury: You are instructed that under the evidence in this case, it being shown that the defendant was chartered in the year 1894, and the undisputed evidence showing that plaintiff after the incorporation of defendant became one of its members, and acted as same, complying with its by-laws, rules and regulations up to the year 1911; that any right of plaintiff against this defendant, and any liabilities of this defendant to plaintiff would be governed by the charter, constitution and by-laws of this defendant corporation, and the court instructs you that under such charter, constitution and by-laws the defendant had the right to raise the rates

of the members of the Fourth Class, and if you believe from the evidence that said raise in rates in 1910 was reasonable and necessary to enable the defendant to meet its obligations to the members of the Fourth Class, then you are instructed to find for the defendant."

(Printed record, p. 59.)

Defendant also requested the following charge:

"In the event that the first three special charges shall be refused defendant asks the following:

Gentlemen of the Jury: You are instructed that the plaintiff and all those in the Fourth Class of the defendant's Insurance Department were mutual insurers of each others' lives; that each and all of them were bound to pay the face value of those certificates to each other, and in order to be able to pay these certificates as they matured, they had the implied power to increase the rates to such point as was necessary to enable them to meet these obligations. You are, therefore, instructed that if you find from the evidence that it was necessary to raise the rates in 1910, as is shown by the evidence to have been done, you will find for the defendant."

(Printed record, bottom p. 58, top of p. 59.)

The court, at the request of plaintiff's counsel, peremptorily instructed a verdict for the plaintiff for three thousand six hundred and sixty-three and 35/100 (\$3,663.35) dollars, which the jury, under directions of the court, immediately returned

into court. (Printed record, bottom p. 62.) For this amount the judgment was rendered. (Printed record, pp. 63, 64.) The necessary steps were then taken by motion for a new trial, assignments of error, etc., and the case was carried to the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. It was there in all things affirmed. (Printed record, pp. 178, 179.) The judgment of affirmance, at a later day of the term, was modified and reduced to the sum of three thousand and fifty-two and 35/100 (\$3,052.35) dollars. (Printed record, pp. 206, 207.) Application was then made to the Supreme Court of the State of Texas for a writ of error to review the judgment of the lower court. The writ of error was refused, one of the three justices dissenting. (See bottom of p. 207.) Application was then made to Honorable Anson Rainey, Chief Justice of the Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, for writ of error (Printed record, pp. 108, 109, 110 and 111), which was by him granted, and the case brought here (Printed record, p. 212), plaintiff in error making the following assignments of error:

I.

“The Honorable Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas erred in determining and holding that the questions involved in said case and presented to it for decision were not ones of exclusive federal jurisprudence, and making it incumbent upon that court to follow

the rules laid down by the Supreme Court of the United States in determining the rights of plaintiff as against the defendant.

II.

The said court erred in holding and determining in said case that by the terms of the charter of your petitioner, it, Supreme Lodge, Knights of Pythias, was obligated to perform the contract of insurance upon which said Mims' suit was predicated, and made your petitioner liable in damages to appellee for a breach thereof.

III.

The said court erred in holding and determining that the rerating of appellee, that is to say the raising of the monthly assessments to the sum of \$34.80 per month against him, was unauthorized by the terms of your petitioner's charter.

IV.

Said court erred in holding and determining in its said opinion that the rerating or raising of the monthly assessments to the sum of \$34.80 constituted a breach of plaintiff's insurance contract, and entitled him to recover from your petitioner the sums paid to it, the unincorporated society, and the old corporation, which had issued said policy.

V.

Said court erred in holding and determining that there was any evidence, other than the provision of petitioner's charter, which

would support the judgment to the effect that your petitioner, plaintiff in error, had assumed the contract of insurance upon which appellee's suit is predicated.

VI.

Because said court erred in inferentially holding that the old corporation issuing the contract sued upon, did not have authority to rerate or raise said assessments above the amount of \$3.60 per month.

VII.

The said court erred in not holding that your petitioner was without power under the terms of its charter to issue or assume any contracts of insurance except as same should be governed and limited by the charter and laws of your petitioner passed in conformity thereto.

VIII.

The court erred in not holding that the agreement of plaintiff to conform to and obey the laws, rules and regulations of the Order governing the rank of insurance now in force (which meant the rank to which plaintiff belonged), or that may be hereafter enacted, or submit to the penalties therein contained, did not authorize your petitioner to pass any laws in respect to said insurance that were reasonably necessary.

IX.

The said court erred in determining that the obligation in the application for the insur-

ance certificate sued upon to pay all monthly dues required, did not obligate the plaintiff to pay the assessments made by your petitioner.

X.

Because said court erred in rendering a judgment against your petitioner for any sum whatsoever."

After stating many of the facts the Honorable Court of Civil Appeals disposed of the Federal questions, as follows:

"Appellant presents several assignments of error and urges many propositions thereunder in support of its contention that the trial court erred in directing the jury to return the verdict rendered. We do not regard it necessary to state and discuss seriatim the propositions contended for by appellant, and shall state without regard to the order in which these propositions appear in the brief, our conclusions, which will sufficiently indicate the questions raised.

1. We are not aware of any authority supporting the contention of appellant that the question (or any of the questions) presented for decision to be one of exclusive 'federal jurisprudence,' and making it incumbent upon this court to follow the rules laid down by the Supreme Court of the United States in determining the rights of the plaintiff, as against the defendant in this case. * * *

2. The evidence is sufficient to show that the defendant, immediately upon its incor-

poration, took over and absorbed the membership and entire insurance business of the corporation which issued the policies or contract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from appellee monthly payments of dues and assessments as a consideration for carrying out his contract of insurance, and these facts rendered it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance and by it broken. Evidently, defendant contemplated this when it applied for and obtained its charter. Besides, we think the provision in the defendant's charter, which is set out in our statement of the facts, obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof."

(Printed record, p. 172.)

The provision of the constitution referred to is found on p. 171 of the printed record, and reads as follows:

"The defendant's charter granted in 1894, provides that, 'all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in Section 1 of this act, shall survive and succeed to and against the

body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any laws which provides for the extinguishing of claims or contracts by limitations of time.' ”

Again, touching the power of rerating, the court said:

“The rerating of appellee, whereby the assessments against him were so greatly increased, was, we believe, unauthorized and constituted such a repudiation or breach of his insurance contract as entitled him to recover in this action the sums paid upon it.”

(Printed record, p. 173.)

The court also found that:

“The plaintiff in his application for the certificates issued to him in 1879 and 1885, agreed to conform to and obey the laws, rules and regulations of the order governing the Endowment Rank of the old corporation, ‘now in force, or that may hereafter be enacted, or submit to the penalties therein contained’; that the certificates issued to him were conditioned that ‘in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted,’ there would be paid to Mary J. Mims, plaintiff’s wife, the sums therein specified, and declared that it was understood and agreed that any violation of the mentioned conditions herein, or the requirements

of the laws in force governing said rank should render the certificate void; that in the laws passed in 1884 it is provided that 'these laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote.' "

(Printed record, p. 173.)

The court further held:

"The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him and the reservation of a general power to amend its by-laws, nor the recitation in said contract to the effect that it was issued upon the condition that the appellee paid to the endowment rank 'all monthly payments as required and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted,' authorize appellant to increase the rate of assessments as the record discloses was done. While a fraternal insurance society or association may so amend its constitution and by-laws to make 'reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or implicitly by the contract itself.' And it seems clear that such a corporation may expressly reserve the right and power to increase the monthly assessments of its members, but such reservation must be so explicitly and clearly stated in the contract

itself or in some paper forming a part of the contract, that the member insured is fully advised that the terms of the contract he is entering into may be changed by the insurer in that respect. By the terms of the certificate issued to him, and the by-laws fixing the rate of his monthly assessment at the time of its issuance, which became and was a part of said contract, appellee knew what he was obligated to pay and what he was entitled to receive, and under the general reservation to amend its constitution and by-laws and the general stipulation in the contract, to the effect, that, appellee would pay all monthly payments as required and fully comply with all the laws governing the Endowment Rank, as a condition upon which the money therein specified was to be paid to his beneficiary, no amendment materially changing and impairing the contract as made with him could be enacted or adopted that would be binding upon him."

(Printed record, p. 174.)

POINTS OF LAW AND ARGUMENT.

We submit the following propositions:

I.

The Honorable Court of Civil Appeals erred in determining that the questions involved in this case were not ones of exclusive Federal jurisprudence.

ARGUMENT.

As hereinbefore shown the plaintiff in error was adjudicated to be liable to defendant in error by the Honorable Court of Civil Appeals, first, because by the terms of its federal charter granted by Congress it had assumed the obligations of the old corporation; and, second, that it had no power granted it by its federal charter to increase the rates of insurance, which the court adjudged to be a voluntary breach of its contract.

The construction of these two provisions of its charter were pre-eminently questions for the federal court, and the Court of Civil Appeals erred in not recognizing the rule so well established that decisions of federal courts in respect to federal statutes are conclusive on State courts. The State court would have been quick to have recognized the reciprocal rule that the decisions of a State court in respect to the effect of a State statute are conclusive on the federal court. It is a curious fact that the learned Court of Civil Appeals did not recognize this elementary principle.

The charter of the plaintiff in error is a public statute of the United States (28 Stat. at Large, 96, 97.) By virtue of the Constitution of the United States, this court is the final arbiter of all questions relating thereto and depending thereon. It is said in the case of *Texas, etc., R. Co. vs. Hill*, 35 Sup. Ct. Rep. 575, that "as a corporation created by an act of Congress, the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence, the motion to dismiss is without merit." It is expressly held in the case of *Texas, etc., R. Co. vs. Marcus*, 35 Sup. Ct. Rep. 578, that the judgment of a Federal Circuit Court of Appeals in an action against a corporation, created by an act of Congress may be brought up for review in the Federal Supreme Court by a writ of error. Section 237 of the Judicial Code provides that

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority ex-

exercised under the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgments or decrees of such state court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ."

That the judicial construction of a charter of a federal corporation constitutes a suit "arising under the laws of the United States" see

Pacific R. R. Cases, 115 U. S. 5 Sup. Ct. Rep. 1113;

Union Pac. R. Co. vs. Harris, 158 U. S. 326, 15 Sup. Ct. Rep. 843.

It is well established that where a suit is brought in a state court and a federal question is presented the defendant may permit the case to go to judgment and take his appeal to the Supreme Court of his State and, if the decision of the court is against the federal right for which he contends, he may then sue out a writ of error to the Supreme Court of the United States and present the ques-

tion before that tribunal. The case comes before that Court presenting exactly the same questions as would be presented if the defendant had taken the other course—had petitioned for a removal to the federal court, and had carried the case to the Supreme Court of the United States by way of appeal or writ or error from the federal court. The plaintiff in error in this case took the former course. He litigated the case to final judgment in the State court and carried the cause to the Court of Civil Appeals of the State of Texas, where his federal right for which he had contended was denied. This was the highest court to which the plaintiff in error could appeal in that State. It therefore sought by a writ of error to that court to have its federal right adjudicated in this court.

In the recent case of *Supreme Council Royal Arcanum v. Green*, 35 Supt. Ct. Rep. 724, this court reversed the judgment of the Court of Appeals of New York, which court had refused to give full faith and credit to the decision of the Supreme Court of Massachusetts in a case in which it had determined the charter rights of the Royal Arcanum, a corporation organized under the laws of the State of Massachusetts. It was there correctly held that the Supreme Court of Massachusetts was the final arbiter as to the meaning and powers of a corporation chartered by a public statute of that State. This court correctly held that the decision of the Massachusetts Supreme Court was binding upon all of the States under the full faith and credit clause of the Con-

stitution of the United States. No other decision could be reached in such case unless we are to have anarchy in the construction of statutes granting powers to corporations. In the present case, if the plaintiff in error is held to be concluded by the Supreme Courts of the various forty-eight States, at least two of which are absolutely contradictory to those of the others which have passed upon the questions involved, its business will result in complete anarchy. A certificate of insurance held by a member in Texas will be held to mean one thing, and the certificate of another member, in exactly the same language, will be held in Indiana to mean the opposite. It is evident that in the Green case the Supreme Court of Massachusetts was given the right and the power to decide finally as to the construction and meaning of its own statute. It is just as plain that the supreme courts of the various States do not have the conclusive right to pass upon the statutes of a different jurisdiction. From the very nature of the case the federal courts are the ones which must pass upon the rights, duties, and powers of a corporation which is chartered by a public statute of the United States. Otherwise we would have forty-eight different constructions upon a single statute, none of which would be controlling outside of the State wherein it was decided. As the Supreme Court of Massachusetts is the final arbiter of the statutes of Massachusetts, by the same token, the Supreme Court of the United States must be the final arbiter of all the statutes of the United States. The ques-

tion then arises, does the federal charter, granted to the plaintiff in error, to conduct a fraternal beneficiary society, give it power to raise its rates, when it is ascertained that it will result in the death of the society and the loss of insurance to every member holding a certificate. It has been held that in the absence of a reserved right to amend and alter the by-laws, a mutual benefit association has the inherent right to do so. *Supreme Lodge Knights of Pythias, v. Knight*, 117 Ind. 489, 3 L. R. A. 409, *et auth.* It is not, however, necessary to base the plaintiff in error's claim upon an implied right. Section 4 of the charter (28 U. S. Stat. at Large, 96, 97) provides: "That said corporation shall have a constitution and *shall have power to amend the same at pleasure*; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State." Under the power so granted the plaintiff in error has the express power to change its rates to make them conform to what the experience of the insurance world shows to be safe and necessary. The authorities for this proposition are collected at the end of point IV of this brief.

II.

The Honorable Court of Civil Appeals erred in determining that by the terms of the charter of plaintiff in error, it—Supreme Lodge, Knights of Pythias—obligated itself to perform the contract of insurance upon which Mims's suit was predi-

cated, which contract had been issued by an old corporation which had expired four years before the present corporation, plaintiff in error, was organized.

ARGUMENT.

It must be remembered that the language of the section of the charter relied upon by defendant in error reads as follows:

“Section 3. That all claims, accounts, debts, things in action, or other matters existing for or against the *present Supreme Lodge, Knights of Pythias*, mentioned in Section ‘1’ of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitation of time.” (Printed record, p. 179.)

A fair construction of this language not only fails to support the contention of defendant in error, but actually disproves it. It will be remembered that there was an old fraternal Beneficiary Society, Knights of Pythias, created in the District of Columbia by the authority of the federal statute of 1870, and which expired by its own terms in 1890. From 1890 until 1894 an unincorporated association operated as the Supreme Lodge, Knights of Pythias. It was in existence at the date when the charter of the plaintiff in error was obtained. In other words, it was incorporated by an act of Congress of which Section 3 is a part. It

provided that the corporation should assume the debts of the present Supreme Lodge, Knights of Pythias. It is only necessary to inquire what was the "present Supreme Lodge, Knights of Pythias." Did not mean the one then in existence—the unincorporated association—or did it mean the incorporated Supreme Lodge, Knights of Pythias, the charter to which had expired four years before. To ask the question is to answer it. If one should write "present Chief Justice of this Honorable Court" no one would suspect that the writer meant the former distinguished Chief Justice who has been dead for more than four years. If one should write of the present Governor of Texas, no one would suspect that he meant a man who was governor four years ago, and is now dead. If one should now write of the present occupant of the White House—the President of the United States—no one would suggest that it was a former occupant of the White House who has not been there for four years. If a husband should make a will designating his present wife as a beneficiary, no one would suspect that he sought to name a former wife who had been dead for four years. But why multiply illustrations?

We repeat that the language of Section 3 not only fails to assume the debts of the old corporation, but by its terms it excludes them. This conclusion will not be changed by a suggestion that if the unincorporated society assumed the obligations of the old corporation, the effect of this section would be to have the new corporation assume them likewise,

because there is no evidence of any kind or character that the unincorporated society assumed the debts of the old corporation. If such assumption had never been made the defendant in error failed to offer any evidence of it.

III.

There was no evidence other than Section 3 of the charter of plaintiff in error upon which the Honorable Court of Civil Appeals could have based its conclusion that plaintiff in error had assumed the obligation of the policy contract sued upon.

ARGUMENT.

To be sure there was evidence that plaintiff in error had collected premiums on the old policy from the defendant in error. To this we will call attention under another proposition. But the mere acceptance of dues or premiums by the plaintiff in error did not constitute an assumption of the contract or policy sued upon. This is well settled by the Supreme Court of Texas in the case of *Eddy & Cross, Receivers v. Hinnant*, 82 Tex. 384. In the case cited the question arose as follows:

The East Line Railroad, a corporation in Texas, had entered into a contract with Hinnant giving him free passage over its railway as a part of the consideration for its right of way. The East Line sold its road to the Missouri, Kansas and Texas Railway Company. Hinnant sought to enforce his obligation against it as a succeeding owner of the cor-

poration, and compel it to carry him free. In discussing that the Supreme Court used the following language:

“If it be admitted that the East Line Company sold and conveyed its railway and other property to the Missouri, Kansas and Texas Company, as far as it was in the power of the one to buy and of the other to sell, yet in our opinion it does not follow that the plaintiff could recover in this case. The contract made by the brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this State he had a right of action for its breach against the company with whom it was made. But in order to show a right of action in the present case, *it was necessary for the plaintiff to prove not only that the Missouri, Kansas and Texas Company bought the East Line Railway, but also that it assumed the obligations of the East Line Company, or at least promises to perform the particular contract upon which the action in this case is based.* If A sell B a tract of land upon which a vendor's lien exists in favor of C, the land may be subjected to the payment of the debt; but B is not liable upon the contract for the purchase money, unless in his contract with A he has assumed to pay it, nor would any recognition of the promise of A to pay C the purchase money or any part payment upon it make him liable personally upon it. And so with the Missouri, Kansas and Texas Railway Company and its receivers in this case. They

could respect *the contract of the East Line and Red River Railway Company as long as they desired*, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited the *title to the right of way and to the other property* conveyed by B. C. Hinnant and his wife to the East Line Company; still, they were not responsible *in damages for the failure to carry it out.*"

This was later approved in *Hutchinson v. R. R.*, 111 S. W. 1106.

Indeed, the Supreme Court of Texas could have rendered no other decision upon that question without ignoring the statutory enactments of the State which had been in existence for three-quarters of a century. In 1840 the Texas Legislature enacted a statute which now constitutes Article 3356, Revised Civil Statutes of Texas, 1911. In so far as applicable, it reads as follows:

"Article 3965. (2543.) (2464.) Written Memorandum Required to Maintain Certain Actions. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized: * * *

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another. * * * "

This constituted Article 2875 of what was known as Paschall's Digest, which is an old compilation of the statutes. It was carried forward in the Revised Statutes of 1879 as Article 2464, and in the Revised Code of 1895 as Article 2543.

It will be seen, therefore, that the plaintiff in error could not be charged with the debt of the old corporation unless the promise or agreement, or some memorandum thereof shall be in writing and signed by the party charged therewith, or by some person by him thereunto duly authorized. Unless Section 3 of the statute in question constitutes such an assumption of the indebtedness there was none.

It will be seen, therefore, that the Honorable Court of Civil Appeals was obliged to base its decision upon this written assumption, or decide in favor of plaintiff in error. The harsh part of the decision of the Court of Civil Appeals consists in fact that they construed that section to be an assumption of the indebtedness, and yet they exempt the contract thus assumed from all control by the corporation. The court treats the contract as obligating plaintiff in error to pay the full amount of the policy therein mentioned, and yet denies to the ~~defendant~~ ^{plaintiff} in error *power* under its charter to provide itself with funds to meet these obligations.

But if we are wrong in the above, and if plaintiff in error did by Section 3 of its charter assume the obligation sued upon, then we submit upon that hypothesis the following proposition:

IV.

The policy sued upon and application therefor, the old policies for which it was substituted, the constitution and by-laws construed together, gave to the old Supreme Lodge the right to raise the rates in the event it should become necessary so to do.

ARGUMENT.

It will be noted that defendant in error applied for and obtained two certificates on the 30th of April, 1879, in the old corporation, one for \$1,000.00 and the other for \$2,000.00, the one being No. 5383 and the other No. 7869, each payable to his wife. Defendant in error in his application for these certificates, as well as the one sued upon, agreed to conform to and obey the laws, rules and regulations of the Order governing the Endowment Rank of the old corporation "*now in force or that may be hereafter enacted, or submit to the penalties therein contained.*" (Printed record, p. 173.) The certificates are precisely alike, except in amount. For that reason only one of them is here set out, No. 5383, which reads as follows:

"No. 5383.

CERTIFICATE OF MEMBERSHIP

ENDOWMENT RANK OF THE ORDER OF KNIGHTS
OF PYTHIAS.

This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and

is a member in good standing in said Rank. And in consideration of the *representations and declarations* made in his application bearing date of April 11, 1879, which *application* is made a part of *this contract*, and the payment of the prescribed admission fee; and in consideration of the *payment hereafter to said Endowment Rank of all assessments as required*, and the full *compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted*, and shall be in good standing under said laws, the sum of One Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided, however, that if at the time of the death of the said Brother S. Mims, Jr., there shall be less than One Thousand Members in this Class, there shall only be paid a sum equal to One Dollar for each member in good standing in this Class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In witness Whereof, We have hereunto subscribed our names and annexed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) D. B. WOODRUFF,
Supreme Chancellor.

JOSEPH DOWDALL,
Supreme Keeper of Records.

Issued this the 30th day of April, 1879, P. P. XVI, at Indianapolis, Indiana, and registered in Book 1, Folio 132.

(Signed) JOHN B. STUMPH,
Supreme Master of Exchequer."

(Printed record, p. 96.)

On May 7, 1885, the defendant in error applied for the certificate sued on in lieu of the other two. His applications for the change were like the old certificate, identical except in number, and made on the same day. (See bottom of p. 97, and top of p. 98, Printed record.) A new certificate for \$3,000.00 was issued to him on the 29th of May, 1885. It reads as follows, to wit:

"CERTIFICATE OF MEMBERSHIP.

No. 4183.

Fourth Class. \$3,000.00.

ENDOWMENT—OF THE ORDER OF KNIGHTS
OF PYTHIAS.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in *consideration*

of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender of the Certificates heretofore held by him in 1st and 2d Classes for cancellation, as requested in his application for transfer to the Fourth Class, bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of Three Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said Brother in his Application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this Certificate.

Provided, however, that if at the time of the death of said Brother, one monthly payment to the Endowment Fund by members holding an equal amount of Endowment shall not be sufficient to pay the amount of endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding equal amount of Endowment.

And it is understood and agreed that *any violation of the within-mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this Certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.*

In Witness Whereof, We have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,
Supreme Keeper of Records and Seal.

Issued this 29th day of May, 1885, P. P. XXII, at Washington, District of Columbia, and registered in Book 1, Folio 84.

(Signed) HALVOR NELSON,
Supreme Secretary."

(Printed record, pp. 98, 99.)

At the date of the issuance of the new certificate the charter of the old corporation contained the following provision:

"9. And be it further known, That the said Supreme Lodge shall have power to alter and amend its constitution and by-laws at will. * * *

(Printed record, p. 93.)

In 1880 the old corporation adopted, among others, the following by-laws:

“ARTICLE V.

Section 5. The power to adopt any additional forms, change, alter or amend any of the secret work, laws, or the business details connected therewith, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank in detail and require of all the Sections a strict conformity therewith.

ARTICLE VI.

Section 4. These laws may be altered or amended at any regular session of the Supreme Lodge, K. of P.”

(Printed record, p. 149.)

Under the head of “Powers of the Supreme Lodge,” the Supreme Lodge in 1884 adopted the following provisions:

“ARTICLE V.

Section 4. If after paying a benefit, there remain in the fund belonging to the Class of which the deceased was a member, a less sum than is sufficient to pay a benefit in that class, the Supreme Secretary shall immediately notify the Secretary of each Section to collect and forward to him an assessment of \$1.10 from each member of said Class, which must be paid within thirty days.

ARTICLE VII.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote."

(Printed record, p. 150.)

In 1886, at its annual session at Toronto, Ontario, it passed, among others, a law providing rules for medical examiners, the applications for certificates of membership, and forms of certificates of membership, and further provided as follows:

"ARTICLE V.

Sec. 5. The power to adopt any additional forms, alter or amend *any of the laws* or the business details connected with the Endowment Rank, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the rank in detail, and to require on the part of all Sections a strict conformity therewith.

ARTICLE VI.

Sec. 1. The funds of the Endowment Rank shall be as follows:

The Endowment Fund, which shall be derived from all the monthly assessments and from the special assessments when necessary.

Sec. 3. *Assessments may be ordered by the board of control whenever required by the necessities of the Endowment Rank."*

(Printed record, pp. 152, 153.)

At the same time they further amended their laws as follows:

“ARTICLE XI.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge of Knights of Pythias of the World, by a two-thirds vote.”

(Printed record, p. 153.)

Then in 1888 the old corporation amended its by-laws as follows, under the head “Powers of the Supreme Lodge”:

“Sec. 1. It possesses the power, in accordance with the laws of the Order, to establish the Endowment Rank.

Sec. 6. To create, hold and disburse through a Board of Control, the funds of the Endowment Rank, under such regulations as may deem necessary. * * * ”

(Printed record, p. 153.)

It then prescribed, among other things, the form of application for membership, and the form of the certificate to be issued to the members.

(Printed record, pp. 153, 154, 155.)

In addition thereto it amended Art. IV and made it read as follows, to wit:

"ARTICLE IV.

Monthly Assessments and Forfeiture of Certificate of Endowment.

Sec. 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the Secretary of the Section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided for in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank; unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World. (Omitting Table of Monthly Payments.)

Sec. 2. If at the time of the death of a member, the number of the members of said rank shall not be sufficient to pay in full the maximum amount of endowment held under the certificate of said deceased member, then there shall be paid to the beneficiary an amount equal to the proceeds of one full assessment made upon all the remaining members of the said Endowment Rank, less ten per cent., for expenses, and the payment of such sum to the beneficiary shall be in full of all claims and demands under and by virtue of said certificate."

(Printed record, pp. 155, 156.)

ARTICLE VI.

Sec. 1. The funds of the Endowment Rank shall be placed to the credit of the Endowment Rank, which shall be derived from all

assessments; from the membership fees; certificate fees; clearance card fees, from the sale of supplies and from all other sources of revenue.

Sec. 3. Special assessments may be made upon all members of the Endowment Rank by the Board of Control, when necessary to meet the liabilities of the Rank.

ARTICLE VII.

Sec. 5. The Board shall have entire charge and full control of the Endowment Rank, subject to such restrictions as the Supreme Lodge may, from time to time, provide.

Sec. 9. The Board is hereby authorized to enact general laws, rules and regulations in conformity with this Constitution for the government of Sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.

Section 17. The Board is hereby empowered and directed to rerate the members transferred from the First, Second and Third Classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the Fourth Class at the age they were when becoming members of the First, Second and Third Classes. The Board is instructed to rerate this class of membership so as to require them to hereafter pay as of their age when becoming members of the fourth class, said rerating to take effect at such date as the Board shall prescribe on and

after the 1st day of August, 1888; and the board is further empowered to rerate the present table of the fourth class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the rank."

(Printed record, pp. 156, 157.)

On March 1, 1894, and before the incorporation of plaintiff in error, the rates were increased five cents per \$1,000. (Printed record, p. 126.) On September 1, 1901, the National Fraternal rates were adopted, changing the old rates. (Printed record, pp. 126, 127.) In addition to that seven special assessments were made before the raise in rates in 1910, the first, July, 1892, two years before the incorporation of plaintiff in error; the others May, 1901, February, 1909, September, 1909, March, 1910, May, 1910, and July, 1910.

The defendant in error testified on the trial of the cause in the trial court, as follows:

"I joined this fraternal organization for the purpose of insuring my life for the benefit of Mrs. Mims, and also for the purpose of helping other Knights of Pythias. I presumed that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I supposed that the only source of revenue to meet my policy and other policies issued by the Insurance Department would be obtained from assessments on those insured, and I also

presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase.* I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be *less per head on those five thousand members than it would be when the ranks had been reduced to two thousand.* As the membership decreased the death rate *increased and they would be obliged to increase the assessments* if they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan.

If you reduced the membership to two thousand and the death rate increased as they grew older, *you certainly would have to increase that rate if you met the obligations.* I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I cannot remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise, when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to

pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonging to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at Ft. Worth."

(Printed record, p. 120, p. 121, down to Redirect Examination.)

Under the facts above stated the correctness of our Fourth Proposition to the effect that the policy sued upon and the application therefor, the old policies for which it was substituted and the applications therefor, the charter and by-laws properly construed gave to the old Supreme Lodge the right to increase the rates in the event it should become necessary so to do should be conceded.

AUTHORITIES.

- Union Pacific R. Co. v. Myers, 115 U. S. 1, 25;
- Messer v. Ancient Order United Workmen, 180 Mass. 321;
- Wineland v. Knights of the Maccabees, 148 Mich. 608;
- Williams v. Supreme Council, C. M. B. A., 152 Mich. 1;
- Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150;
- Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L. R. A. 409;
- Barbot v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681;
- Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208;

- Richmond v. Supreme Lodge Order of Mutual Protection, 100 Mo. App. 8;
 Miller v. National Council K. & L. of S., 69 Kan. 234;
 Woodmen of the World v. Woods, 34 Colo. 1;
 Shepperd v. Bankers' Union of the World, 77 Neb. 85;
 Connor v. Golden Cross, 117 Tenn. 549;
 Champion v. Hannahan, 138 Ill. App. 387;
 Pierce v. Bankers' Union of the World, 140 Ill. App. 495;
 Mock v. Supreme Council Royal Arcanum, 121 App. Div. (N. Y.) 474;
 Fullenwider v. Supreme Council Royal League, 73 Ill. App. 321, 331;
 Fullenwider v. Supreme Council Royal League, 180 Ill. 621;
 Williams v. Supreme Council, 152 Mich. p. 1;
 Jones v. Knights of Maccabees, — Wash. — (decided June 1915);
 Bartrum v. Supreme Council Royal Arcanum, 6 Ont. W. R. 404;
 Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150;
 Hayden v. Mutual Reserve Fund Life Ass'n, 98 Fed. 200;
 Hayden v. Mutual Reserve Fund Life Ass'n, 104 Fed. 718.

V.

The foregoing statement shows that the defendant in error is now estopped from denying the right

of plaintiff in error to increase the rates as it did in 1910, if necessary, because he had acquiesced in that right and concurred with the old corporation in the fact that it had such power.

AUTHORITIES.

- Wineland v. Knights of the Maccabees,
148 Mich. 608;
Gibbs v. Supreme Lodge, Knights of
Pythias, 156 S. W. (Mo.) 11;
Manning v. San Antonio Club, 63 Tex.
66; 29 Cyc. 70.

ARGUMENT.

At the risk of being tedious we again respectfully call the court's attention to the fact that the original certificates issued to S. Mims provided in express terms that they were issued in consideration of the payment thereafter to the Endowment Rank of all assessments as required, and a full compliance with all the laws governing the Rank then in force or that might thereafter be enacted, and the charter of the old corporation issuing those certificates, at that date authorized the change of the by-laws at will.

It must also be borne in mind that the certificate sued on contained a similar provision, though stronger, to the effect that it was issued, among other things, "in consideration of the payment hereafter to said Endowment Rank of all monthly payments, and a full compliance with all the laws governing this Rank now in force or that may hereafter be enacted." To this must be added his own personal

statement while on the witness stand to the effect that when taking this insurance he knew that unless the membership was kept up to the then standard, and unless the death rate did not increase, the assessments must necessary increase.

He added:

"If you reduced the membership to two thousand and the death rate increased as they grew older, you certainly would have to increase that rate if you meet the obligations. I do not remember whether they raised the rates on me in 1888 and 1901. They raised them so often that I cannot remember the dates. The Knights of Pythias has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910."

(Printed record, p. 121.)

To this must be added the declaration of the old corporation in 1888, in Art. VII, Sec. 17:

"Sec. 17. The Board are hereby empowered and directed to rerate the members transferred from the First, Second and Third Classes under resolution passed by the Supreme Lodge at the session of 1884, (which was the one under which he obtained the certificate sued on) permitting such members to enter the Fourth Class at the age they were when becoming members of the First, Second and Third classes. The Board is instructed to

rerate this class of membership so as to require them to hereafter pay as of their age when becoming members, etc.”

(Printed record, pp. 156, 157.)

Sec. 9 of Art. VII, passed at the same date, provides as follows:

“Sec. 9. The Board is hereby authorized to enact general laws, rules and regulations in conformity with this Constitution for the government of Sections and the membership of the endowment rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.”

(Printed record, p. 156.)

It would seem, therefore, that by contemporaneous construction it was conceded on both sides that the Supreme Lodge and the Board of Control had the right to increase the rates whenever necessity required. It must, therefore, follow that if the plaintiff in error assumed the contract of the old corporation it assumed it with the interpretation placed on it by both parties thereto, towit, that if it became necessary in order to carry out the contract for it to increase the rates charged for insurance, it would have that authority. The Honorable Court of Civil Appeals should have held that the plaintiff in error was without power to assume the indebtedness sued on except on the basis that the defendant in error on becoming one of its members subordinated him-

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self to its laws. It is a well settled rule that when an old corporation issues a policy or a contract, and a new corporation is organized and receives the dues on the old certificates issued by its predecessor, the obligation thus existing by reason of the dues received must be measured and the liabilities must be fixed by the laws of the new corporation.

AUTHORITIES.

- Bollman v. Supreme Lodge, Knights of Honor, 53 S. W. 722—a Texas case in which a writ of error was refused by the Supreme Court. (See 54 S. W. 246);
Wineland v. Knights of the Maccabees, 148 Mich. 608;
Gibbs v. Supreme Lodge, Knights of Pythias, 156 S. W. (Mo.) 11.

ARGUMENT.

It follows, therefore, that any liability under the certificate sued on must be treated as if it were a liability under a certificate issued by the new corporation, and limited and controlled by the new corporation's charter and by-laws.

AUTHORITIES.

- Watson v. N. L. Trust Co., 189 Fed. p. 872;
Niblack Benefit Society and Accident Ins. (2d ed.) Sec. 18, pp. 33, 34; 29 Cyc. 70.

ARGUMENT.

The charter of the new corporation and by the by-laws under which it acted gave it full power to increase the rates whenever it became necessary so to do. The language of the charter of the plaintiff in error conferring the right to amend its by-laws reads as follows:

“Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State.”

(Printed record, p. 95.)

It contained the further provision:

“Sec. 5. That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.”

(Printed record, p. 95.)

It was proven that the new corporation got no funds or any property from the old corporation, or from the unincorporated society. (Printed record, p. 162.) That it got nothing from the old corporation is not directly stated in the testimony, but it is clearly inferred. The witness, Powers, does state emphatically that plaintiff in error got nothing from the unincorporated society, which succeeded the old corporation. We, therefore, submit that it got nothing from the old corporation.

We submit that the judgment of the Court of Civil Appeals brought here for review is a most unrighteous one. It in effect holds plaintiff in error responsible for a contract made by an old corporation and the defendant in error. The contract and all the preliminary acts leading up to it, the charter, by-laws of the old corporation, the language of the application of the defendant in error for the certificate, and the then opinion of the defendant in error as shown by his own testimony all agreed that the old corporation had the right to increase its rates, if necessary—and that it would probably be necessary to increase them. This was acted upon, and the rates were increased from time to time, and they were paid by the defendant in error. If the plaintiff in error assumed that contract it assumed it with the construction which the parties thereto had placed upon it. Later the record discloses that the plaintiff in error increased its rates, and the defendant in error testifies that he paid them all up until 1910. They were again increased because it was found necessary, and as to this fact there is no dispute. They were obliged to increase the rates or else refuse to pay the amount of the certificates. The rates were increased. The defendant in error repudiates all of his promises in his application for insurance, repudiates the language of his certificates that he would pay all the dues and monthly assessments required, and repudiates his construction of the contract of the old corporation, and proceeded to sue plaintiff in error—a fraternal or-

ganization doing business and making no profit—for all the money that he had paid into the treasury. He lost sight of the principle enunciated by this court in the Korn case, 6 Cranch. 192, that his relations to this organization are dual; that he was the insurer of each of his brother Knights of Pythias, as they were insurers of him; and that the greater part of the moneys that he had paid into the treasury of the Order of the Supreme Lodge, Knights of Pythias, had been distributed in the payment of death benefits which he was obligated to pay as much as any member of the Knights of Pythias. But notwithstanding that fact the courts of last resort in Texas have held that he can recover from the Order all of the moneys that he has paid into the treasury and that have been distributed on obligations of his own creation. The injustice of this is apparent. It means that if one thousand young men in the prime of life should enter into a mutual obligation to insure each other's lives for \$3,000 each, and that when a member dies the one thousand members would assess themselves practically \$3 each to pay that policy. They would know when they entered into this obligation that if an epidemic should sweep away half of their number, they must double their assessments. They entered into the agreement with the full knowledge of that fact, just as Mims did when he entered into this contract. But suppose these one thousand men continue their organization? From time to time a member dies, and his place is taken by a new member, the membership always be

ing kept to one thousand. But suddenly an epidemic of yellow fever sweeps five hundred of them into eternity. The other five hundred have to pay these death losses. It is manifest that they must increase their rates, or not pay the beneficiaries the full \$3,000. They do increase the rates for that purpose. One hundred of the remaining five hundred rebel. They say they do not indorse this increased rate, though they knew when they joined that the increase would probably be necessary. They gave to the lodge repeatedly over and over power to change its laws; they not only did that but they voluntarily agreed to change the rates from time to time, but that they will not now permit any other changes. Not only do they object, but they bring suit against the organization for every cent that has been heretofore paid out to families of deceased members on an obligation created by themselves. They expect the court to give them a judgment for the amount of these dues thus paid, with interest thereon from the dates of payment. All because what? Because the organization has done what they felt sure it would probably be obliged to do at the date when they became parties to the contracts which it had made. Surely, that cannot be the law. It is the essence of unfairness, as the authorities heretofore cited conclusively demonstrate.

But if this were a case of first impression we submit that the facts are not susceptible of any other construction than that the old corporation and the new were authorized to increase the rates to such

amount as should be necessary to meet the obligations when due. What could be the meaning of the language, "I agree to conform to and obey the laws, rules and regulations of the Order governing the Endowment Rank 'now in force or that may hereafter be enacted, or submit to the penalties therein contained' "? It must be remembered that the Endowment Rank is the insurance part of the Order. That was recognized by the defendant in error. On p. 121 of the printed record may be found a part of his redirect examination. In this he says:

"I have remained a social member and am a member now, keeping my dues paid all the while."

The obligation then to obey the laws, rules and regulations of this Rank was not simply to obey the by-laws of the social order, but to obey the laws in relation to the Uniform Rank or Insurance Department. The Uniform Rank was an entirely different organization consisting of members of the other organization.

Article I, Section 1, says:

"A section of the Endowment Rank shall consist of not less than seven members who are in good standing. It shall be known as Section No. — of the Endowment Rank, of the Knights of Pythias." (Printed record, p. 109.)

Article III, Section 1, says:

"No person shall be eligible for membership in this Rank unless he be a Knight of Pythias in good and regular standing in his lodge, and not over fifty years of age: Provided, until June 1, 1878, all members of the Knights of Pythias may become members of the Endowment Rank without regard to age, provided they possess the other required qualifications."

(Printed record, p. 110.)

"Sec. 2. Applications for membership must be accompanied by a certificate from the Lodge to which the applicant belongs, that he is not in arrears for dues, and a medical certificate from the physician, designated by the Section, to which the application is made. A fee of three dollars must accompany the application."

(Printed record, p. 110.)

The succeeding portions provide that if he sever his connection with the Lodge of the Knights of Pythias, he also severs his connection with the Uniform Rank.

(Printed record, pp. 110, 111.)

When a member joined the Uniform Rank, and obligated himself to obey all of its rules, laws and regulations theretofore passed, or should be thereafter passed governing that Rank, he meant that he was to obey all the rules, laws and regulations

passed governing the Insurance Department. This necessarily meant that he agreed that the rates should be readjusted, if necessary. The certificates as issued to him contained this statement:

"This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; *and in consideration of the payment hereafter to said Endowment Rank of all assessments as required*, and the full compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of One Thousand Dollars.
* * * "

(Printed record, p. 96.)

The certificate issued in lieu of the two last mentioned, on the 29th of May, 1885, contains this statement, among others:

"This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his Application, bearing date of April 11, 1879, and his absolute surrender

of the certificates heretofore held by him in 1st and 2nd Classes for cancellation, as requested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, *and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required*, and the full compliance with *all the laws governing this Rank, now in force, or that may hereafter be enacted* and shall be in good standing, under said laws, etc. * * *

(Printed record, pp. 98, 99.)

What could be the meaning of his agreement to pay all monthly payments as required? Could it mean anything other than that he would make the payments assessed by the Uniform Rank of the Knights of Pythias? What is the meaning of the language, "that he should fully comply with all the laws governing this Rank now in force, or that may hereafter be enacted", if it were not intended to confer the power to pass any laws necessary to preserve the integrity of the certificates issued and to secure their payment?

We repeat that if no legal construction of these instruments had ever been had this language is of itself enough to bind him to pay whatever assessments were necessary to enable the Endowment Rank to meet its obligations.

Last of all, what was his understanding of the language of his application and the language of the

certificates issued to him? He has answered that from the witness stand under oath. This is the way he answered it:

“I presume that the organization was not for profit, but for the protection of the individual members constituting the insurance circle. I suppose that the *only source of revenue* to meet my policy and other policies issued by the Insurance Department would be obtained from assessments on those insured. I also presume that if I realized on my policy the assessments would have to be sufficient to meet the death claims on the death of the membership. I knew *that unless the membership was kept up to the then standard, and unless the death rate did not increase that my assessments must necessarily increase*. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than it would be when the ranks had been reduced to two thousand. As the membership decreased the death rate increased and they would be obliged to increase the assessments. If they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme was based on the assessment plan.”

(Printed record, pp. 120, 121.)

In view of this language, we beg to suggest to this court that the contract sued upon, the application therefor, and the two for which it was substituted, independent of any other consideration, gave to the Uniform Rank of the Knights of Pythias the right to increase the premiums or assessments whenever necessary to enable the plaintiff in error to meet its obligations; that this was so understood by the plaintiff in error at the time, and was understood by the defendant in error, as he has under oath admitted; that this common understanding of the parties was acted upon repeatedly—the assessments were increased by the plaintiff in error and paid by the defendant in error.

We submit, therefore, that the judgment of the Honorable Court of Civil Appeals should be reversed and here rendered in favor of plaintiff in error and against defendant in error, for all of which it prays.

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U. S. Supreme Court, D. C.
FILED
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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

No. [REDACTED] 345

SUPREME LODGE, KNIGHTS OF PYTHIAS,

Plaintiff in Error,

vs.

S. MIMS, *Defendant in Error*

REPLY BRIEF OF PLAINTIFF IN ERROR.

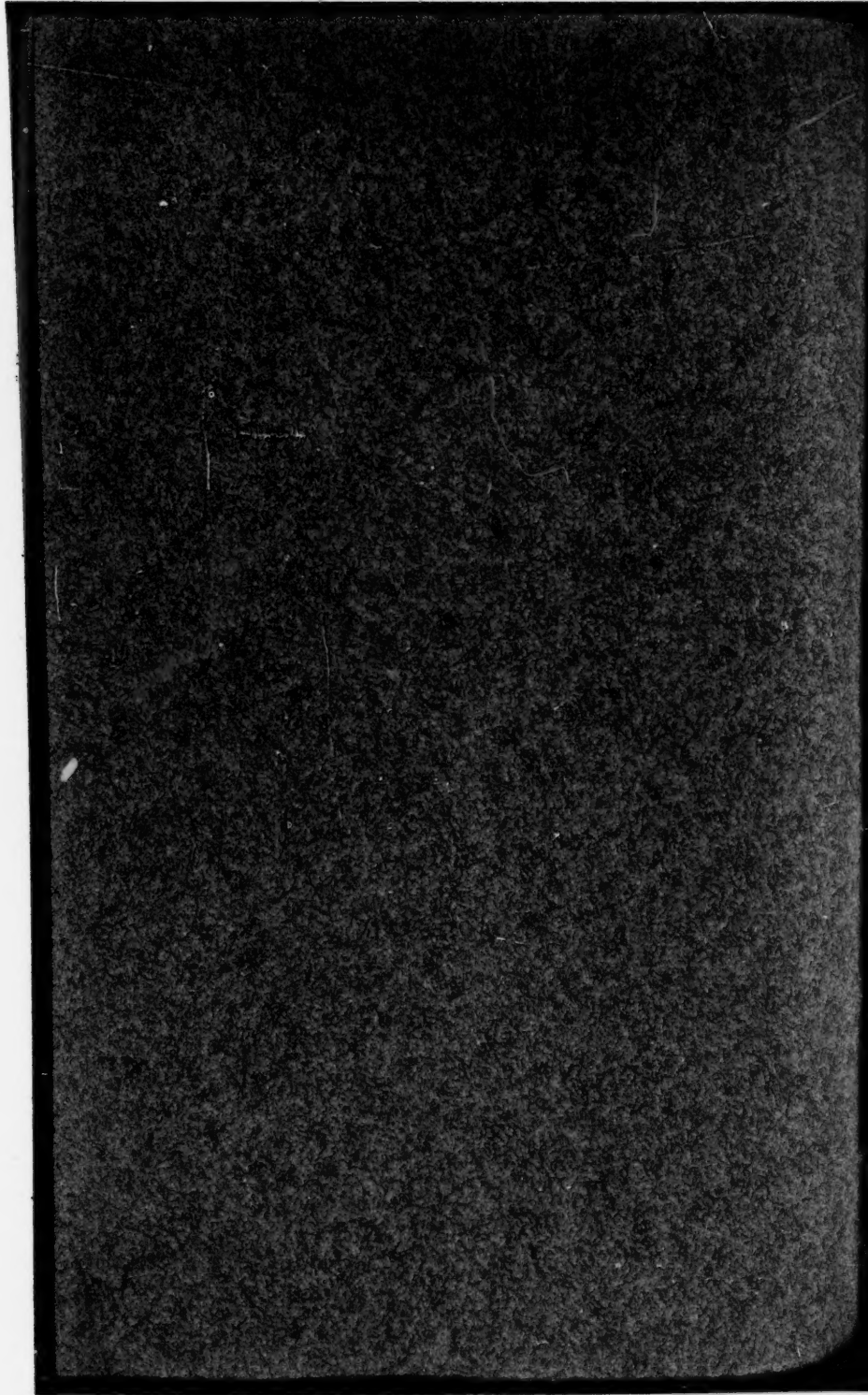
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SUPREME COURT OF THE UNITED STATES

No. 808.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

S. MIMS, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

To the Honorable, The Supreme Court:

The brief filed by counsel for defendant in error in this case contains some criticisms of the statement made in our brief. We will not stop now to answer them, but in subsequent portions of this brief we will show that their criticisms are utterly unfounded.

An analysis of the brief filed by counsel for defendant in error will show that they failed to properly distinguish the case at bar from the many that they cited. They ignore the fact that plaintiff in error was not sued on one of its contracts. The contract sued on was dated in 1885. Plaintiff in error had no existence until nine years thereafter—1894. Yet the whole case has been treated as if plaintiff in error had issued the contract, and then repudiated some of its conditions.

In order to make our position clear we beg permission to briefly restate our case. The policy was issued, as will be hereinafter shown, by the Supreme Lodge, Knights of Pythias of the World. The charter of the Supreme Lodge, Knights of Pythias of the World, expired in 1890. (Printed Record, p. 91.) Its certificate of incorporation reads as follows:

"WHEREAS, it is deemed advisable to have the Supreme Lodge, Knights of Pythias, an incorporated body under the laws of the Congress of the United States, for the more perfect working of the beneficent intentions of the said Order.

"And whereas, with a view to promote this object, and as Grand and Subordinate Lodges of the said Order have been formed or organized in various other states and territories, and will be hereafter formed in various other states and territories of the United States as well as foreign countries.

1. "Now, therefore, be it known, that in accordance with the Act of Congress entitled 'An Act to provide for the creation of corporations in the District of Columbia by General Law,' approved May 5th, 1870, the undersigned having associated themselves for the purpose and with the design of establishing and creating the corporation to be known and named the Supreme Lodge, Knights of Pythias, do hereby make and authorize to be filed in the office of the Register of Deeds, in the District of Columbia, this Certificate and these Articles of Association for the government of themselves, their associates, assigns and successors.

2. "And be it further known, that the beneficial association of which this is the certificate, shall be known

as the Supreme Lodge of the Knights of Pythias, the seal of which has been copyrighted by the Supreme Recording and Corresponding Scribe in the Clerk's office of the Supreme Court of the District of Columbia.

3. "And be it further known, that Joseph T. K. Plant, Past Supreme Chancellor; Clarence M. Barton of the District of Columbia; Venerable Supreme Patriarch Wilber H. Meyers of Pennsylvania; Supreme Chancellor Samuel Read of New Jersey; Supreme Vice Chancellor C. L. Russel of Ohio; Supreme Banker W. A. Porter of Pennsylvania; Supreme Guide John F. Comstock of Connecticut; Supreme Inner Steward H. Clay Lloyd of Kentucky; Supreme Outer Steward George H. Cramer of Nebraska; Past Supreme Chancellor Edward Dunn, Past Grand Chancellor Harry Kronheimer, J. R. N. Curtin, Francis Woods, Hugh G. Devine, Joseph S. Martin of the District of Columbia, together with all Past Grand Chancellors of each and every state, territory or jurisdiction, now organized or hereafter to be organized under the authority of this Supreme Lodge shall constitute from and after the filing of this Certificate as aforesaid, 'The Supreme Lodge of Knights of Pythias of the World.'

4. "And be it further known, that the Board of Trustees of said Supreme Lodge, Knights of Pythias, (who shall be elected annually) shall consist of Joseph T. K. Plant, Clarence M. Barton, Edward Dunn, Joseph S. Martin, Francis Wood, Harry Kronheimer and Hugh G. Devine, who shall serve until the election of their successors at the Annual Session of the Supreme Lodge, Knights of Pythias, in April, 1871, and shall serve without pay.

5. "And be it further known, that no contract for the disbursement of the moneys of the said Supreme Lodge shall be valid and of effect until ratified by the Board of Finance or Financial Committee.

6. "And be it further known, that the officers of the said Supreme Lodge, Knights of Pythias of the World, shall consist of Venerable Supreme Patriarch, Supreme Chancellor, Supreme Vice Chancellor, Supreme Recording and Corresponding Scribe, Supreme Banker, Supreme Guide, Supreme Inner Steward, Supreme Outer Steward, all of whom shall be selected by ballot every alternate year, on the first day of the session of said Supreme Lodge, and the said Supreme Recording and Corresponding Scribe and Supreme Banker shall give such security for the faithful performance of their duty as may be ordered by said Supreme Lodge.

7. "And be it further known, that the said Supreme Lodge shall hold an annual session for the transaction of all business for the benefit and welfare of the Order, and that the Supreme Chancellor may, and on the call of fifteen Past Grand Chancellors, or Past Supreme Chancellors, shall convene the Supreme Lodge at any time business may demand, and all of the said annual sessions shall be held in such city or town as the Supreme Lodge may determine upon at a regular session; provided all special or called sessions shall be held in the City of Washington, D. C.

8. "And it be further known, that a representative from a majority of the Grand Lodges working under the jurisdiction of this Supreme Lodge shall constitute a quorum for the transaction of business.

9. "And be it further known, *that the said Supreme Lodge shall have power to alter and amend its Constitution and By-Laws at will*, and that it shall have power to prescribe modes of initiation, etc., for the working of said Order, and no Grand or Subordinate Lodges, purporting to be Knights of Pythias, shall have legal standing unless chartered by or through the regularly elected officers of this Supreme Lodge, in regular or called session, or by the Supreme Chancellor during the recess of said Supreme Lodge.

"In witness whereof, we, the undersigned officers and members of the Supreme Lodge of Knights of Pythias of the World have hereunto affixed our names and seals this the fifth day of August, A. D. 1870." (*Italics ours.*) (Printed Record, lower half of p. 91, p. 92, and upper half of p. 93.)

During its existence defendant in error joined it; that is to say on April 30th, 1879. His application for membership contained the following statement:

"I hereby agree to conform to, and obey the *laws, rules and regulations of the Order governing this Rank, now in force, or that may hereafter be enacted*, or submit to the *penalties therein contained.*" (Printed Brief, top of p. 20; Printed Record, middle p. 137.) (*Italics ours.*)

He applied for and secured two certificates of insurance in the old Order. They read as follows, to-wit:

"No. 5383.

Certificate of Membership.

Endowment Rank of the Order of Knights
of Pythias.

This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the *payment of the prescribed admission fee*; and in consideration of the *payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing the Rank, now in force, or that may hereafter be enacted*, and shall be in good standing under said laws, the sum of One Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate. Provided, however, that it at the time of the death of the said Brother S. Mims, Jr., there shall be less than One Thousand members in this Class, there shall only be paid a sum equal to One Dollar for each member in good standing in this Class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this

Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In Witness Whereof, we have hereunto subscribed our names and annexed the seal of the Supreme Lodge, Knights of Pythias of the World." (Printed Record, p. 96)

"No. 7869. Certificate of Membership. Second Class.
\$2000.00.

Endowment Rank.

Of the Order of Knights of Pythias.

This certifies, that Brother S. Mims, Jr., has received the Endowment Rank of the Order of Knights of Pythias in Section No. 278, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application bearing date of April 11, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration *of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this Rank now in force, or that may hereafter be enacted,* and shall be in good standing under said Laws, the sum of Two Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the Supreme Master of Exchequer, upon due notice and proof of death, and good standing in the Rank at the time of death, and the surrender of this certificate.

Provided, however, that it at the time of the death of said Brother S. Mims, Jr., there shall be less than Two Thousand members in this Class, there shall only be paid a sum equal to One Dollar for each member in good standing in this Class. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

In Witness Whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World." (Printed Record, p. 97.)

These two certificates were surrendered by defendant in error in lieu of the one sued on, which was issued on the 29th of May, 1885. (See bottom p. 97, pp. 98, 99, Printed Record.)

The certificate sued on reads as follows:

"Certificate of Membership.

No. 4183.

Fourth Class, \$3000.00.

Endowment—of the Order of Knights of Pythias.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1879, and is a member in good standing in said Rank. And in consideration of *the representations and declarations made in his application*, bearing date of April 11, 1879, and his absolute surrender of the certificates heretofore held by him in First and Second Classes for cancellation, as re-

quested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank *of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws* the sum of Three Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this certificate.

Provided, however, that it at the time of the death of said brother, one monthly payment to the *Endowment Fund by members* holding an equal amount of Endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding equal amount of Endowment. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In Witness Whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World."

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,
Supreme Keeper of Records and Seal.

Issued this 29 day of May 1885.

P. P. XXII at Washington, District of Columbia, and registered in Book 1, Folio 84.

(Signed) HALVOR NELSON,
Supreme Secretary."

(Printed Record, lower half of p. 98, and upper half of p. 99.) (Italics ours.)

The defendant in error testified on the trial of the case as to his understanding of these contracts, as follows, to-wit:

"I am secretary and assistant treasurer of the T. & P. Coal Company. I have been individually engaged in business all these years. I joined this fraternal organization *for the purpose of insuring my life for the benefit of Mrs. Mims*, and also *for the purpose of helping other Knights of Pythias*. I presumed that the organization was *not for profit*, but for the *protection of the individual members* constituting the insurance circle. I supposed that the *only* source of revenue to meet my policy and other policies issued by the *insurance department* would be obtained from assessments on those insured, and I also presumed that if I realized on my policy the assessments would have to be sufficient to meet the death claims made on the death of the membership. I knew that

unless the membership was kept up to the then standard, and unless the death rate did not increase *that my assessments must necessarily increase*. I never figured on the question of whether the membership became less and that unless the assessments were increased, it would be impossible to pay the death claims. I naturally knew that if there were five thousand members and one died that the assessments would be less per head on those five thousand members than *it would be when the Ranks had been reduced to two thousand*. As the membership decreased the death rate increased and they would be *obliged to increase the assessments* if they met their obligations according to the contract; that is, on the assessment plan. I presume that this entire insurance scheme *was based on the assessment plan*.

"If, when we had five thousand members a rate is fixed at so much per month, unless that amount was too much. If you reduced the membership to two thousand and the death rate increased as they grew older, *you certainly would have to increase that rate if you meet the obligations*. I do not remember whether they raised the rates on me in 1888 and 1901. *They raised them so often that I cannot remember the dates*. The Knight of Pythias *has raised the rates frequently and I paid those raised rates up to the time of this last raise when I declined*. I paid all of the raised rates, paid every raised rate they fixed from the time that I took out my certificate until 1910, when I declined to pay the raise they made at that time. I maintain my social membership in the lodge now; I have always belonged to the lodge and my dues are paid up now. I belong to the Red Cross Lodge at

Fort Worth." (Printed Record, lower half of p. 120, and upper half of p. 121.)

The charter of the Supreme Lodge, Knights of Pythias of the World, expired in 1890. From that date to June 29th, 1894, the Supreme Lodge, Knights of Pythias, was without a charter. (Printed Record, p. 91.) On the last named date by special act of Congress the Supreme Lodge, Knights of Pythias, was incorporated. Its charter granted by said special act reads as follows:

"An Act to incorporate the Supreme Lodge of the
Knights of Pythias.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That George B. Shaw, of the City of Eau Claire, State of Wisconsin; William W. Blackwell, of the City of Henderson, State of Kentucky; Walter B. Richie, of the City of Lima, State of Ohio; Robert L. C. White, of the City of Nashville, State of Tennessee; Philip T. Colgrove, of the City of Hastings, State of Michigan, and Tracy R. Bangs, of the City of Grand Forks, State of North Dakota, officers and members of the Supreme Lodge, Knights of Pythias, and their successors, be and they are hereby incorporated and made a body politic and corporate in the District of Columbia, by the name of "The Supreme Lodge Knights of Pythias," and by that name it may sue and be sued, plead and be impleaded, in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and

privileges incidental to fraternal and benevolent corporations within the District of Columbia.

"Sec. 2. That the said corporation shall have the power to take and hold real and personal estate, not exceeding in value one hundred thousand dollars, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation.

"Sec. 3. That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against *the present Supreme Lodge, Knights of Pythias*, mentioned in Section 1 of this act, shall survive and succeed to and against *the body corporate and politic hereby created*; provided, that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time.

"Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state.

"Sec. 5. That said corporation shall not engage in any business for gain; the purpose of said corporation being fraternal and benevolent.

"Sec. 6. That Congress may at any time amend, alter or repeal this act. Approved June 29th, 1894."

Chapter 1634—An Act, to amend an act to Incorporate the Supreme Lodge of the Knights of Pythias.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That Section Two of an act approved June twenty-ninth, eighteen hundred and ninety-four, entitled 'An Act to Incorporate the Supreme Lodge of the Knights of Pythias,' be and the same is hereby amended by striking out the words 'not exceeding in value one hundred thousand dollars', so that said section two shall read as follows:

That the said corporation shall have the power to take and hold real and personal estate, which shall not be divided among the members of the corporation, but shall descend to their successors for the promotion of the fraternal and benevolent purposes of said corporation.

Sec. 2. That this Act shall take effect from and after its passage and approval; provided, that said corporation shall not hold or own real estate of the aggregate value of one million dollars at any time.

Approved February 26, 1907.

(United States Statutes at Large, 59th Congress, 1905-7. Vol. 34, Part 1, page 934.) (Printed Record, pp. 94 and 95.)

There is no evidence in the record that the unincorporated association took over any assets from the defunct corporation, or in writing or otherwise assumed in a legal way any of its obligations. Plaintiff in error took over none of the assets of the unincorporated society. The testimony upon that point is as follows, to-wit:

"The new corporation was formed in 1894. None of the funds of the unincorporated concern went into the

*present Order. When this corporation was formed in 1894, I was not with the concern, and all that I know is by the records. * * * They (meaning plaintiff in error) took over its books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I think they were in arrears at the time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation did take over the affairs of the unincorporated Knights of Pythias." (See testimony of W. O. Powers, Printed Record, third paragraph on p. 162.)*

It is admitted that plaintiff in error collected the premiums or assessments on the policy sued on from the defendant in error. The controversy arising out of this situation was based on these contentions of defendant in error; first, that by the act of incorporation plaintiff in error assumed the contract of the old defunct corporation, burdened with an irrevocable by-law that forbade its rerating, even though rerating should be found necessary; second, that in addition to the assumption of the obligation in the charter plaintiff in error assumed it in some other way not defined by the record.

The paragraph of the charter which defendant in error says constitutes the assumption of the obligation sued on is in these words:

"Sec. 3. That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the *present Supreme Lodge, Knights of Pythias*, mentioned in Section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided, that nothing

contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time." (Printed Record, first paragraph, p. 95.)

Bearing in mind that this act of incorporation was for the purpose of incorporating an unincorporated society it sufficiently answers the contentions of defendant in error. By the *present* Supreme Lodge, Knights of Pythias, the Congress meant the unincorporated association. It could not have meant any other because it was the only association in existence. The old corporation had been dead for four years. It would be just as appropriate to say, if this Court in an opinion referred to the *present* Governor of Texas, that it did not mean the one now occupying the present Executive chair, but one who had occupied it four years ago, but who was not now in office. If we, when referring to the *present* Chief Justice of this Court were to say that we meant the distinguished Chief Justice who formerly presided here, but who is now dead, we would proclaim ourselves as ignorant of ordinary English. One of the cardinal rules of construction is that words in a statute must be given their ordinary meaning, unless there be something in the context to indicate otherwise. But the context in this instance makes the meaning clear. This section not only says that it assumes the obligations of the *present* Supreme Lodge, Knights of Pythias, but says it is the present Supreme Lodge, Knights of Pythias, mentioned in Sec. 1 of the Act. Going back to Sec. 1 of the Act, it reads as follows, to-wit:

"Be it Enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That George B. Shaw, of the City of Eau Claire, State of Wisconsin; William W. Blackwell, of the City of Henderson, State of Kentucky; Walter B. Richie, of the City of Lima, State of Ohio; Robert L. C. White, of the City of Nashville, State of Tennessee; Philip T. Colgrove, of the City of Hastings, State of Michigan, and Tracy R. Bangs, of the City of Grand Forks, State of North Dakota, *officers and members of the Supreme Lodge, Knights of Pythias*, and their successors, be and they are hereby incorporated and made a body politic and corporate in the District of Columbia, by the name of 'The Supreme Lodge, Knights of Pythias,' and by that name it may sue and be sued, plead and be impleaded, in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and privileges incidental to fraternal and benevolent corporations within the District of Columbia."

It is too plain for argument that the Supreme Lodge, Knights of Pythias, mentioned in Sec. 1 was the unincorporated organization known as the Supreme Lodge. Having incorporated the unincorporated society it was its obligations that it assumed, and none other.

It should, therefore, be conceded that when Congress used the term "*present* Supreme Lodge" it meant the unincorporated association. Therefore it was the obligations of the unincorporated association that it assumed, and none others. There being not a scintilla of evidence that the unincorporated organization had ever assumed the obligations of the old corporation there is absolutely nothing upon which the contention can be predicated that plaintiff in error by the terms of its charter assumed the payment of the certificate sued on.

We note that it is suggested in the motion to dismiss, as well as in the other brief filed, that there is other evidence of the assumption of this indebtedness by the plaintiff in error. This we respectfully deny, and again submit that it may become the duty of the Court to examine the record to verify or disprove this assumption. To be an effective assumption of the contract the Texas law requires it to be in writing. Art. 3965 of the Revised Statutes of Texas, 1911, reads as follows:

"Art. 3965. (2543.) (2464.) Written Memorandum Required to Maintain Certain Actions. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized: * * *

2. To charge any person upon a promise to answer for the debt, default or miscarriage of another." * * *

That constituted Art. 2875 of what was known as Paschall's Digest. It was carried forward in the Revised Statutes of 1879 as Art. 2464, and was, therefore, the law of Texas when defendant in error became a Knight of Pythias. The second codification took place in 1895, and Art. 3965, above printed, constituted Art. 2543, Code of 1895. An examination of its provisions will demonstrate that plaintiff in error could not be charged with the debt of the old corporation unless a promise, an agreement, or some memorandum thereof shall be in writing and signed by the party charged therewith, or by some person by it thereunto duly authorized. There is no claim made by defendant in error that there is such written promise or memorandum.

To be sure, the plaintiff in error received the premiums on the certificate of insurance sued on from the date of its incorporation until 1910. That, however, would not constitute an assumption of the contract. The Texas Supreme Court settled that question in the case of *Eddy & Cross vs. Hinnant*, 82 Tex. 384, in the following language:

"If it be admitted that the East Line Company sold and conveyed its railway and other property to the Missouri, Kansas & Texas Company, as far as it was in the power of the one to buy and of the other to sell, yet in our opinion it does not follow that the plaintiff could recover in this case. The contract made by the brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this State he had a right of action for its breach against the company with whom it was made. But in order to show a right of action in the present case, *it was necessary for the plaintiff to prove not only that the Missouri, Kansas & Texas Company bought the East Line Railway, but also that it assumed the obligations of the East Line Company, or at least promised to perform the particular contract upon which the action in this case is based.* If A sell B a tract of land upon which a vendor's lien exists in favor of C, the land may be subjected to the payment of the debt; but B is not liable upon the contract for the purchase money, unless in his contract with A he has assumed to pay it, nor would any recognition of the promise of A to pay C the purchase money or any part payment upon it make him liable personally upon it. And so with the Missouri, Kansas & Texas Railway Company and its receivers in this case. They could respect the *contract of the East*

Line & Red River Railway Company as long as they desired, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited the title to the right of way and to the other property conveyed by B. C. Hinnant, and his wife, to the East Line Company; still, they were not responsible in damages for the failure to carry it out." (Printed Brief, p. 42, and top of p. 43.)

This doctrine was again announced in *Hutchinson vs. Railroad*, 111 S. W. 1106.

The Supreme Court of Texas could not have rendered any other opinion unless they had ignored Art. 3965 of the State statute above cited. If the Court shall differ from us and hold that by the terms of the charter of plaintiff in error it did assume the policy sued on, then we submit the following proposition:

That the old corporation issuing the contract sued on reserved the right to amend its by-laws, and if necessary to re-rate its membership.

The charter of the old corporation contained this language:

9. "And be it further known, *that the said Supreme Lodge shall have power to alter and amend its Constitution and By-Laws at will. * * **" (Italics ours.) (Printed Record, beginning seven lines from top of p. 93, and ending eighth line from top of p. 93.)

The defendant in error in joining the organization made his written application of date April 11, 1879, in the following words and figures:

"I hereby agree to conform to, and obey the laws, rules and regulations of the Order governing this Rank, now

in force, or that may hereafter be enacted, or submit to the penalties therein contained." (Printed Brief, top of p. 20; Printed Record, middle p. 137.) (Italics ours.)

The certificate sued on was issued in consideration of that promise made in that application. It reads as follows:

"Certificate of Membership.

No. 4183.

Fourth Class, \$3000.00.

Endowment—of the Order of Knights of Pythias.

This certifies, that Brother Shadrick Mims, Jr., received the Endowment Rank of the Order of Knights of Pythias in Section No. 278 on April 11, 1897, and is a member in good standing in said Rank. And in consideration of the *representations and declarations made in his application, bearing date of April 11, 1879, and his absolute surrender of the certificate heretofore held by him in First and Second Classes for cancellation, as requested in his application for transfer to the Fourth Class bearing date of May 7, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws the sum of Three Thousand Dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Mary J. Mims, wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary entered upon the records of the Supreme Secretary of the Endowment Rank; upon due notice and proof of death, and good standing in the Rank at the time of the death and surrender of this certificate.*

Provided, however, that if at the time of the death of said brother, one monthly payment to the Endowment Fund by members holding an equal amount of Endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment of the Endowment Fund by each member holding equal amount of Endowment. And it is understood and agreed, that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In Witness Whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World."

(Signed)

JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest:

R. E. COWAN,

Supreme Keeper of Records and Seal.

Issued this 29 day of May, 1885.

P. P. XXII at Washington, District of Columbia, and registered in Book 1, Folio 84.

(Signed)

HALVOR NEISON,
Supreme Seceretary."

(Printed Record, lower half of p. 98, and upper half of p. 99.)

Defendant's in error understanding of the contract was stated in the following words:

*"As the membership decreased the death rate increased, and they would be obliged to increase assessments if they met their obligations according to the contract,—that is on the assessment plan. * * * The Knights of Pythias have raised the rates frequently, and I paid those raised*

rates until up to the time of this last raise, when I declined. I paid all the raised rates, paid every raised rate that they fixed from the time I took out my certificate until 1910, when I declined." (Printed Record, p. 121, upper half of page.)

In 1884 the Supreme Lodge, Knights of Pythias, adopted the following as a part of its by-laws under the head of "Affairs of the Supreme Lodge":

"Article V.

Section 5. The power to adopt any additional forms, change, alter or amend any of the secret work, laws, or the business details connected therewith, is vested in the Supreme Lodge exclusively, and it shall be the duty of that body to preserve uniformity in the workings of the Rank in detail and require of all the Sections a strict conformity therewith." (Printed Brief, p. 50; Printed Record, p. 149.)

"Article VII.

Amendments.

These laws may be altered or amended at any regular session of the Supreme Lodge, Knights of Pythias, by a two-thirds vote." (Printed Record, p. 150; Printed Brief, p. 51.)

This was before the issuance of the certificate sued on. In 1886 at Toronto, Canada, the same body passed another by-law, as follows:

"Article VI.

Sec. 1. The funds of the Endowment Rank shall be as follows:

The Endowment Fund, which shall be derived from all the monthly assessments and from the special assessments when necessary.

Sec. 3. *Assessments may be ordered by the Board of Control whenever required by the necessities of the En-*

dowment Rank." (Printed Brief, p. 51; Printed Record, pp. 152, 153.)

Again, Art. 11 of their by-laws reads as follows:

"Article XI.

Amendments.

"These laws may be altered or amended at any regular session of the Supreme Lodge of Knights of Pythias of the World, by a two-thirds vote." (Printed Brief, p. 52; Printed Record, p. 153.)

In 1888 they passed the following provisions:

"Sec. 1. It (meaning Supreme Lodge) possesses the power, in accordance with the laws of the Order, to establish the Endowment Rank.

Sec. 6. To create, hold and disburse through a Board of Control, the funds of the Endowment Rank, under such regulations as it may deem necessary. * * *" (Printed Record, p. 153; Printed Brief, p. 52.)

Again, it amended Art. 4 so as to make it read as follows:

"Article IV.

Monthly Assessments and Forfeiture of Certificate of Endowment.

Sec. 1. Each member of the Endowment Rank shall, on presenting himself for obligation, pay to the Secretary of the Section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided for in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank; *unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World.* (Omitting Table of Monthly Payments.)

Sec. 2. If at the time of the death of a member, the number of the members of said Rank shall not be suffi-

cient to pay in full the maximum amount of endowment held under the certificate of said deceased member, then there shall be paid to the beneficiary an amount equal to the proceeds of one full assessment made upon all the remaining members of the said Endowment Rank, less ten per cent, for expenses, and the payment of such sum to the beneficiary shall be in full of all claims and demands under and by virtue of said certificate." (Printed Brief, p. 53; Printed Record, pp. 155, 156.)

"Article VI.

Sec. 1. The funds of the Endowment Rank shall be placed to the credit of the Endowment Rank, which shall be derived from all assessments; from the membership fees; certificate fees; clearance card fes, from th sale of supplies and from all other sources of revenue.

Sec. 3. Special assessments may be made upon all members of the Endowment Rank by the Board of Control, when necessary to meet the liabilities of the Rank."

"Article VII.

Sec. 5. The Board shall have entire charge and full control of the Endowment Rank, subject to such restrictions as the Supreme Lodge may, from time to time, provide.

Sec. 9. The Board is hereby authorized to enact general laws, rules and regulations in conformity with this Constitution for the government of Sections and the membership of the Endowment Rank, and alter and amend such general laws, rules and regulations, when in their judgment the needs of the Rank require such action.

Section 17. The Board is hereby empowered and directed to *recreate the members transferred from the First, Second and Third Classes under resolutions passed by the Supreme Lodge at the session of 1884 permitting such members to enter the Fourth Class at the age they*

were when becoming members of the First, Second and Third Classes. The Board is instructed to rerate this class of membership so as to require them to hereafter pay as of their age when becoming members of the Fourth Class, said rerating to take effect at such date as the Board shall prescribe on and after the 1st day of August, 1888; and the Board is further empowered to rerate the present table of the Fourth Class, applying it to all members, should such action become necessary for the proper protection and perpetuity of the Rank." (Printed Brief, p. 54, and top of p. 55; Printed Record, pp. 156, 157.)

The above was the state of the laws when the old corporation expired. Its Supreme Lodge has been clothed by its by-laws in which defendant in error had acquiesced, with the power to rerate its members if found necessary. In other words, the Supreme Lodge had exercised the power conferred upon it by its charter, the certificate sued on and defendant's in error application for membership in the Order. The following authorities recognize its right to thus amend its by-laws:

Korn & Wisemiller vs. Mutual Assurance Society, 6 Cranch. 195;

Thomas vs. Maccabees, 149 Pac. 7;

Carl Newman vs. Supreme Lodge, Knights of Pythias, 70 So. 2+1; (Number 4, Advance Sheets);

Knights of Honor vs. Bieler, (Ind.) 105 N. E. 244;

Supreme Commandery vs. Ainsworth, 72 Ala. 436;

Barbot vs. Mutual Reserve Fund Life Ass'n, 100 Ga. 681;

Haydel vs. Mutual Reserve Fund Life Ass'n, 98 Fed. 200;

Mutual Reserve Fund Ass'n vs. Taylor, 99 Va. 208;

Miller vs. National Council, K. & L. of S., 69 Kan. 234.

The by-laws fixing the level premium rate is no more sacred than the provision in the by-laws and charter authorizing it to

change these by-laws. The level rate premium was subordinate to the power to change in the case of necessity. This is particularly true of fraternal organizations such as these. This Court in the Korn case, above cited, so determined more than a century ago. It used these words:

"The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. 'We will abide by, observe and adhere to the Constitution and regulations which are already established, or may hereafter be established by a majority of the insured present in person, or by representatives, or by the majority of the property insured represented either by the persons themselves or their proxies duly authorizd, etc.' It would be difficult to find words of more extensive signification than these, or better calculated to aid, explain or enforce the general principle that the majority of a corporate body must have power to bind its individuals."

It is upon that theory and the authority of that case that it has been so often held by other courts that the level premium fixed in a fraternal organization is subject to the power of the association at any subsequent time by amendment to its laws to increase them. This is done on the general principle enunciated by the Supreme Court of New York, in the case of *Powers vs. Clark*, 127 N. Y. 417, 425, in which the Court said:

"An instrument designed to further a business transaction should be so construed as to promote rather than retard its general purposes."

It being the purpose of this organization to insure its membership and to pay the insurance upon the death of a member

its by-laws should be so construed as to make the accomplishment of that purpose possible. It must be conceded that the persons who made the by-law fixing the level premium rate had no greater authority than those who subsequently changed it.

Richardson vs. Society, 58 N. H. 189;
 Supreme Lodge vs. Kutscher, 179 Ill. 340, 346;
 Supreme Lodge vs. Trebbe, 179 Ill. 348, 353;
 Dornes vs. Supreme Lodge, 75 Miss. 466, 478;
 Christ Church vs. Pope, 8 Gray, 140, 142.

The evidence in the record is uncontradicted that it was necessary to raise the rates in order to meet its obligations. The testimony of the actuary stated what the value of the certificate sued on would have been prior to August, 1910, if the rates had not been raised. His opinion is stated in these words:

"Taking into consideration * * * all of the facts and circumstances connected with the condition and future prospects of said fourth class; considering all of said facts the value of the certificate of S. Mims, provided he continued to pay the rates enforced prior to August, 1910, would be \$211.00." (Printed Record, p. 134.)

Again he said:

"In my opinion as an actuary, it was necessary for the Supreme Lodge at its convention in 1910 to adopt the laws that were there adopted, whereby the assessments paid by the members of the fourth class were changed; my reason for holding this opinion is that the assessments paid by the members in the fourth class were insufficient to enable the insurance department to continue to pay to the beneficiaries the amounts of the certificates as the certificates matured as death claims." (Printed Record, p. 142.)

In this there is no contradiction.

That it did have the power to change these rates, in order to meet its liability even though they had been fixed under the level premium by-law, the following authorities attest:

- Thomas vs. Maccabees, 149 Pac. 7;
 Fullenwider vs. Supreme Council, Royal League, 73 Ill. App. 321, 331;
 Newman vs. Supreme Lodge, K. of P., 70 So. 241;
 Fullenwider vs. Supreme Council, Royal League, 180 Ill. 621;
 Messer vs. Grand Lodge, United Workmen, 180 Mass. 321;
 Conner vs. Golden Cross, 117 Tenn. 549;
 Williams vs. Supreme Council, C. M. B. A., 152 Mich. 1;
 Bartram vs. Royal Arcanum, 6 Ont. W. R. 404;
 Reynolds vs. Supreme Council, Royal Arcanum, 192 Mass. 150;

Knights of Honor vs. Bieler, 105 N. E. 244.

If we are correct in the foregoing it would follow that if this were a suit against the old corporation issuing this policy, it must be held that the old corporation would have had the right to have increased these rates should it have become necessary so to do. But when we find that the defendant in error became a member of the new corporation created by its charter in 1894, then it must follow that his rights under his policy issued by the old corporation and the liabilities of the new corporation to him must be measured by the charter and by-laws of the new corporation.

- Bollman vs. Supreme Lodge, Knights of Honor, 53 S. W. 722—a Texas case in which a writ of error was refused by the Supreme Court. (See 54 S. W. 246.)
 Wineland vs. Knights of the Maccabees, 148 Mich. 608;
 Gibbs vs. Supreme Lodge, Knights of Pythias, 156 S. W. (Mo.) 11;
 Watson vs. N. L. Trust Co., 189 Fed. 872;

Niblack Benefit Society & Accident Ins. (2nd Ed.), Sec. 18, pp. 33, 34; 29 Cyc. 70.

It becomes, therefore, necessary to see what were the powers under the new corporation. The provisions of the charter are as follows:

"Sec. 4. That said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State." (Printed Record, p. 95.)

"Sec. 5. That said corporation shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent." (Printed Record, p. 95.)

It will be seen that the new corporation had power to amend its by-laws at pleasure. When the defendant in error became a member of the new corporation, plaintiff in error, he became subject to that charter provision. The power of the corporation to amend its by-laws could not be limited by a previous by-law of a defunct corporation of which defendant in error had formerly been a member. He was obliged to come in on terms of equality with other members; otherwise, the principles of fraternal insurance for which the organization was called into being, would have been ignored. The leading principle of fraternal insurance is that there must be equality between the members.

Mock vs. Supreme Council, Royal Arcanum, 121 App. Div. (N. Y. 474;

Reynolds vs. Royal Arcanum, 192 Mass. 150;

Hall vs. Western Travellers' Acc. Ass'n, 69 Neb. 601;

Swan vs. Mutual Reserve Fund Life Ass'n, 155 N. Y. 9.

Moreover, the new corporation had no authority to receive members except as authorized by its charter, and it received the membership with the express understanding that it, the

corporation, would have the power to change its by-laws when it became necessary. It had no power to repeal a section of its charter. That could be done by the American Congress, but not by the corporation. That charter was the measure of its power. It could exercise all of the powers conferred upon it, but none other. One of the powers *not* conferred upon it was to deny itself the privilege by contract of amending its by-laws. Such a contract depriving it of such power would be *ultra vires* and void.

Central Transportation Co. vs. Pullman Palace Car Co., 139 U. S. 24;

National Bldg. & Loan Ass'n vs. Home Savings Bank, 181 Ill. 35; 64 L. R. A. 399.

That members coming from an old corporation into a new corporation, come subject to the by-laws of the new corporation has been judicially determined in more than one case. That precise question was dealt with by the Supreme Court of Missouri in the case of Gibbs vs. Knights of Pythias, 156 S. W. p. 11. It appeared that a certificate of life insurance was issued to the insured, one James Williams, on September 30, 1892, by one of the defendants in said case, the Supreme Lodge, Knights of Pythias of North and South America, Europe, Asia and Africa, a fraternal beneficial association, incorporated, and with headquarters in the District of Columbia. It appeared that this company never qualified as a fraternal beneficial association under the Missouri statutes, but notwithstanding that fact, it established subordinate lodges in the State of Missouri, and that the insured affiliated with one of these lodges; that he paid all assessments and dues on the certificate issued by said corporation, and as a member of the Order, as they accrued and were levied, to said Supreme Lodge until by an arrangement with all of its members that Order,

acting through the Supreme Lodge, organized and incorporated as subordinate thereto, the defendant the Grand Lodge, Knights of Pythias for the State of Missouri, and that thereupon and thereafter the insured paid all his assessments and dues to the latter.

It further appeared that in 1898, or about one year after the certificate was issued by the Supreme Lodge, the Grand Lodge, Knights of Pythias of Missouri, was incorporated in said State and succeeded to all of the affairs of the said Supreme Lodge, which was incorporated in 1892 in the District of Columbia.

It further appeared that in September, 1893, the Supreme Lodge, Knights of Pythias of North and South America, Europe, Asia and Africa withdrew entirely from further operations in the State of Missouri, and the Grand Lodge, Knights of Pythias of Missouri, assumed full and complete jurisdiction over the various subordinate lodges in Missouri, among which was Mound City Lodge No. 4, of which the insured was then a member, and assumed, too, the obligations of the Supreme Lodge to its members of all certificates of insurance, and all of the members, among them the insured, James Williams, agreed to this arrangement. Thereafter the insured paid all of his assessments and dues on his certificate as a member of the Order to the Grand Lodge of the State of Missouri so incorporated and operating under the Missouri statutes, and performed all of the conditions imposed by the contract on his part, until the date of his death, which occurred November 7, 1909. During all of these years the insured retained his original certificate of insurance issued to him by the Supreme Lodge in 1892, and at no time surrendered to or requested a new certificate in lieu thereof from the Grand Lodge of the State of Missouri, under whose jurisdiction he had come, and

which had undertaken with his consent to assume the obligation of the Supreme Lodge in that behalf.

In discussing the question as to what laws governed the certificate and plaintiff's rights, the Court uses the following language :

"We are not concerned with the powers of the Supreme Lodge which originally issued the certificate of insurance under its charter in the District of Columbia, and, indeed, as to that matter the Court is wholly unadvised, for nothing was given in evidence touching it except that it was a fraternal insurance society."

The Court held that the charter, constitution and laws of the last corporation, chartered under the laws of Missouri governed the rights of plaintiff in that case, and in so doing used the following language :

"Touching this matter, it appears that the Supreme Lodge which issued the certificate, but had never qualified in this State, withdrew entirely from the field, and submitted the whole matter of its business to the Grand Lodge, organized in Missouri under our statute. The insured and all of the members consented to this arrangement, and became affiliated with the Grand Lodge of Missouri under Missouri statute, *which undertook to employ its powers in effectuating the certificate of insurance and fulfilling the office of the Supreme Lodge as to the social side of the Order.*

It is true the insured omitted to surrender his old certificate and to apply for a new one from the Missouri Grand Lodge, but, be this as it may, he agreed to the arrangement, whereby the Missouri Grand Lodge was to utilize its powers in executing the contract of the Supreme Lodge, and it is only by maintaining that such was consummated that the suit can be sustained at all against the Missouri Grand Lodge on the certificate issued by the

Supreme Lodge. *Obviously, this certificate must be taken and enforced cum onere.* There is no special contract of assumption as such in the case, nor was any ever delivered to the members or annexed to the certificates. The right asserted here against the Missouri Grand Lodge arises solely from the arrangement whereby it came into being with the *consent* of the insured, and of the Supreme Lodge and through their co-operation for the purpose of accumulating a fund under its Missouri charter to effectuate the contracts of the Supreme Lodge then retiring from the State. The original contract was necessarily thereby modified with respect to the right of the insured to designate a beneficiary to take the fund who was competent to receive it under the Missouri charter for the Missouri Grand Lodge could accumulate a fund only in accordance therewith, and for the purposes therein set forth."

In the case of *Watson et al vs. National Life & Trust Co.*, reported in 189th Fed. Rep. 872, where similar questions arose, the Court in discussing the question where the policy holders of one corporation were transferred to another, uses the following language:

"Each policy holder when an attempt was made to transfer him had at least three options: (1) To regard the transfer as an abandonment of the contract and bring an action at once for an accounting and recovery of the amount then due on his policy or bond;

(2d) Continue to pay his premiums under protest, and thus keep the contract alive as against the company by whom it was issued and against the assets transferred by it;

(3d) Acquisce in the transfer and assumption of his claim, and accept the new insurer. But he could not at the same time ratify and repudiate the transaction. He could not retain an assumption certificate by the new com-

pany, pay his premiums without protest to the company taking over the business, and then after a long period of time hold the new company, if it was then to his advantage to do so, or repudiate it if that best served his purpose. He must elect his course, and having once made a definite election, must abide by it, and in the absence of some new agreement he was required to make his election with reasonable promptness, taking into consideration the fact that this was a business in which many were interested, and conditions repeatedly changing."

The same principle and doctrine to the effect that plaintiff's certificate and his rights against this defendant are governed by the charter, constitution, rules and regulations of this defendant, and that plaintiff occupied the same attitude towards this defendant as if said certificate had been issued by it under its charter, rules, constitution and regulations, is laid down in Mr. Niblack in his work on benefit societies and accident insurance, second edition, Sec. 18, pp. 33-34, and in the 29th Cyc. of Law, page 70, and the authorities there cited. Mr. Niblack lays down the rule as follows:

"One *who becomes a member of a mutual benefit society* is chargeable with knowledge of the provisions of its charter and by-laws, and is bound by them. He can not be ignorant of them, nor he cannot refuse obedience to them unless they are illegal, or require the performance of acts which the law forbids. * * * The person who enters a society must acquaint himself with its laws, for they, to the extent of their provision, measure his duties, his rights and his liabilities. * * * While he may always insist that a certain by-law is contrary to law, and for that reason void, yet he may not assail the binding force of a by-law *existing when he was admitted into the society* on the ground that it was not regularly adopted, or that the society had no power to make it. * * * Where the articles of association of an unincorporated society

are silent as to any power to alter them, and a majority of the members vote to changethem, the change so made is valid and binding as to all who voted for, assented to, or in any way acted on or enjoyed the benefits of such change. And acquiescence in the change for a time after it has become known to a member will be construed as an adoption of it."

The 29th Cyc. of Law, page 70, thus lays down the rule:

"The members are bound by the terms of the charter, constitution and by-laws, although they have no actual notice thereof." Citing numerous authorities.

In the case at bar, under the undisputed facts above referred to, and under the decisions of the Courts above cited, the conclusion is irresistible that plaintiff and his rights against this defendant under the certificate issued to him by the old corporation, and his certificate and his rights thereunder, must be governed by the charter, constitution, rules and regulations of this defendant corporation existing and under which it acted at the date of its incorporation, and subsequent thereto.

The undisputed evidence in this case showed that under such laws, charter and constitution, the defendant had the undoubted right to pass the laws complained of by the plaintiff in this suit raising the rates of assessments, and the undisputed evidence showing that said laws were not only reasonable, but necessary, plaintiff has no right to recover against this defendant, and upon this point alone we confidently assert that this case should be reversed and rendered in favor of appellant.

The Ericson case, 146 S. W. 160, a Texas case relied upon by the defendant in error in this case, is wholly dissimilar. The statement of the Supreme Court of Texas in its syllabus illustrates the difference. In that case an Ohio fraternal cor-

poration on the lodge plan established a lodge in Texas, and a member of that lodge obtained a benefit certificate. Thereafter a Pennsylvania corporation was organized to receive the members and assets of the Ohio corporation, and the entire membership and assets weretransferred to the Pennsylvania corporation, and it assumed all liabilities of the Ohio corporation. The Pennsylvania corporation subsequently adopted a constitution providing for the rerating of the members taken over from another society. It was held that a member of the Texas lodge became a member of the Pennsylvania corporation, and was not received into the Pennsylvania corporation from another body within the Constitution, and, therefore, the Pennsylvania corporation could not rerate him. In passing on the question the Court used this language:

"The language of the amendment of 1907 did not include members theretofore taken over from other orders. Its very terms are plainly prospective; and courts will not give retroactive effect to language which is fairly susceptible of a construction which would give the law a prospective operation. The amendment to the constitution, if applied to members 'taken over,' etc., after its adoption, would be valid; but we need not decide whether it would be void if it embraced Ericson and those in his class." (146 S. W. 162.)

It will be seen, therefore, that in the Ericson case it was not decided that the corporation formed with a charter giving it power to pass by-laws rerating its membership could not, therefore, pass a law rerating all of its members. What it did decide was that the Supreme Lodge in that case passed a law which plainly evidenced an intention to make it apply prospectively, and then undertook to give it a retroactive effect which was not permitted.

It is scarcely necessary to call attention to the fact in this argument that we are not contending that the State has the right to pass any law impairing the obligations of contracts. We shall not, therefore, examine the authorities cited by counsel for defendant in error on that point. There has been no effort on the part of the plaintiff in error to pass any by-law impairing the obligations of its contracts. What it has sought to do is to give effect to its contracts. Even a tyro in corporation law knows that the provisions of a corporation's charter and by-laws are practically and substantially read into all of its contracts. The stockholders must take notice of the fact of the power of the corporation heretofore shown, and, therefore, when a corporation after the making of a contract exercised one of the rights which its charter and by-laws had reserved unto it at the date that the contract was made, it can not be justly charged with repudiating its contracts or in any sense impairing its obligations.

The power to conduct a fraternal order carries with it the power to adopt all reasonable regulations and by-laws necessary to make the order effective, even to increasing rates. This position is strongly stated in the case of *Ebert vs. Mut. Reserve Fund Life Ass'n*, 81 Minn. 116, and is still further illustrated in the following cases:

Supreme Lodge, K. of P. vs. Knight, 117 Ind. 389, 3 L. R. A. 409, 412;

Clark vs. Mutual Reserve Fund Life Ass'n, 43 L. R. A. 390, 395;

Norton vs. Catholic Order of Foresters, 114 N. W. (Iowa) 893, 894;

May vs. N. Y. Reserve Fund Society, 13 N. Y. St. Rep. 66, 70;

Willison vs. Jewelers' & Tradesmen's Co., 61 N. Y. Supp. 1125, 1126.

In the Knight case, *supra*, the Supreme Court of Indiana said:

"Where, as here, there is an express and clear reservation of the right to amend, *he is bound to take notice of the existence and effect of that reserve power.* The power to enact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one.

No one has a right to presume that by-laws will remain unchanged. Associations and corporations have a right to change their by-laws when the welfare of the corporation or association requires it, and it is not forbidden by the organic law. The power which enacts may alter or repeal

The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary, in the sense of being appropriate, *including the right of a reasonable choice of means to be employed.*"

Cyc., Vol. 10, p. 1097, states the rule in this language:

"The implied powers of a corporation are those which naturally arise from the nature of the business. The implied powers are not limited to those which are indispensably necessary, but *include those which are appropriate, convenient and suitable for carrying out the express powers.*"

Summed up our contentions are these:

1. That defendant in error on joining the Knights of Pythias in 1879 expressly promised to conform to and obey the laws, rules and regulations of the Order governing this Rank, which meant the Insurance Department, then in force

or that might thereafter be enacted; that this promise necessarily included a promise to abide by any rerating that might be necessary in order to make his certificate available.

His testimony shows that he expected, when he joined, that the rates would be changed as necessity required, and when in 1885, the certificate sued on was issued to him in lieu of two others thereby cancelled, that certificate was made to state that it was issued in consideration, among other things, of the promise that he had made on the 11th of April, 1879, to conform to the laws then in existence, or that might thereafter be passed. The certificate itself bound him to do likewise.

2. That the fact that a by-law was in existence at that date which fixed the amount of his assessments is immaterial, because in his application, as well as in the certificate, he had agreed that that by-law might be changed, because there were no limitations in the promise. It was not an agreement that certain by-laws might be changed, but that all or any of them, if deemed necessary.

3. That the by-laws of the old corporation were from time to time changed, and thereby the rates increased, and he acquiesced in those changes and paid the rates, and thereby with the Supreme Lodge contemporaneously construing the effect of its various obligations as giving to the old Supreme Lodge the right to increase the rates.

4. That the by-laws of the corporation in 1888 expressly conferred on the Supreme Lodge the right to rerate; that this law was passed without objection from defendant in error, and that he must be held to have been bound thereby.

5. That the old corporation with which all of these transactions were had expired in 1890, and for four years there-

after the Supreme Lodge, Knights of Pythias, was unincorporated.

6. That thereafter plaintiff in error in 1894 was organized by an Act of Congress, which ^{compel it to} did not assume the certificate sued on, but whose liability to the defendant in error was based upon its obligation to him after he came into its organization, and ^{where} ~~that~~ those rates, and liabilities and obligations must be measured by its charter and its by-laws.

7. That the charter of plaintiff in error having given it the express power to raise the rates, if necessary, in that it gave power to pass or change its by-laws at will, it had the power to rerate defendant in error and all others in his class, and that having passed a by-law raising the rate, defendant in error could not successfully resist this increased rate, unless he could show that it was unreasonable or unnecessary.

All of these contentions are based on two provisions of the charter; first, that the charter did not compel the plaintiff in error to assume the indebtedness evidenced by the certificate issued by the old corporation; and, second, that the charter did give to the plaintiff in error the right to increase its rates, if deemed necessary.

Wherefore, the plaintiff in error asks that this case be reversed and judgment here rendered for plaintiff in error.

Gas. E. Watson
 H. P. Brown
 M. M. Crane
 Edward Crane

Attorneys for Plaintiff in Error,
 Supreme Lodge, Knights of Pythias.



UNITED STATES OF AMERICA

1915

OCTOBER 1915

THE KNIGHTS OF PYTHIAS

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THE STATE OF TEXAS,)
COUNTY OF DALLAS.)

I, the undersigned Lawrence C. McBride, do upon oath state that I am attorney of record for the Defendant in Error in the case of Supreme Lodge, Knights of Pythias, Plaintiffs in Error, v. S. Mims, Defendant in Error, referred to in the accompanying brief of Defendant in Error, and that I personally did, on the 30th day of March, 1916, deliver to M. M. Crane at his office and address in the City of Dallas, Texas, he being attorney of record for Plaintiff in Error, in said case, a true copy of said brief.

.....
Subscribed and sworn to before me, this March 30, 1916.

.....
Notary Public, Dallas County, Texas.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 345.

OCTOBER, TERM, 1915.

SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

S. MIMS, *Defendant in Error.*

In Error to the Court of Civil Appeals of the Fifth Supreme
Judicial District of the State of Texas, at Dallas.

BRIEF FOR DEFENDANT IN ERROR.

JOSEPH E. COCKRELL,
EDWARD GRAY,
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S. Mims.

STATEMENT OF THE CASE.

The statement of the case as made by the plaintiff in error, and which consists in the main of detailing portions of the pleadings, is inaccurate and misleading in several particulars, and is controverted. Defendant in error has undertaken

to accurately state the case in his Motion to Dismiss or Affirm, and as this motion is being submitted along with the case we assume that we are authorized to, and we do, refer to same without the necessity of repetition here.

Certain inaccurate statements of plaintiff in error in its brief are now controverted and certain additional material facts, not referred to by it, are given.

At page 64 of its brief appellant states that "the contract and all the preliminary acts leading up to it, the charter, by-laws of the old corporation, the language of the application of the defendant in error in the certificate, and the then opinion of the defendant in error as shown by his own testimony, all agreed that the old corporation had the right to increase its rates if necessary, and that it probably would be necessary to increase them". As no facts or page references are referred to in support of the statement, doubtless we are not required to notice it; but it is regrettable that counsel will make this statement, or rather misstatement—the very reverse of the facts, as will appear by the findings of fact of the Court of Civil Appeals (printed record, 167 to 178). Defendant in error in 1879 became insured with the old corporation upon what was its "post-mortem" plan, by which upon death of a member an assessment would be levied upon its remaining members to pay the death benefit. He had a certificate for \$1,000.00 in what was called the "First Class", and one of \$2,000.00 in the "Second Class", both of which were upon such "post-mortem" plan (printed record, 167-168). Under such plan all members paid equal assessments, regardless of age or occupation—"assessments were not graded according to the age of the members or the risk that they imposed, but were equal upon all members carrying an equal amount of insurance" (printed record, p. 89). And so it was under *this* (post-mortem) plan that Mims was "of the opinion", of course, that the right to demand assessments

according to the necessities existed. But in 1884 the old corporation created what was called a "Fourth Class" (printed record, p. 168), and thereafter received no members in the "post-mortem" classes (printed record, p. 140, line 25), and most members at once transferred to the fourth class—"the fourth class was established in 1884, and its assessment plan supplanted by the ante-mortem plan, most of the members transferring to this class" (printed record, p. 122, last paragraph). Mims promptly transferred to the fourth class, May 7, 1885 (printed record, p. 168).

In creating the fourth class it was provided (printed record, 114, 115):

"The endowment fund for the payment of benefits in the fourth class shall be derived from *monthly* payments by each member, said payments to be for each one thousand dollars of endowment, and *to be graded according to the age of the member at the time of making application, and his expectancy of life*, the age to be taken at the nearest anniversary of his birthday. So much of the monthly payments as shall equal the cost of the endowment shall constitute the endowment fund, and the residue of such monthly payments shall be placed in the reserve fund. Said monthly payments *shall be based upon the average expectancy of life* of the applicant, and *shall continue the same so long as his membership continues*. The said monthly payment for endowment and reserve shall be according to the following table."

Then follows a table of rates varying from ages 21 to 60, inclusive, in which was: "Age at admission 42, total monthly payments for each one thousand dollars, \$1.20" (printed record, p. 168, eighth line from bottom to ninth line, p. 169). Forty-two was Mims' age when he first joined the Order in 1879 (printed record, 105, 117).

At first after creation of the fourth class the Order counted, for purposes of grading assessments, "age of member at the time of making application", as meaning date of original application for membership in the Order, but beginning with August 1, 1888, the age of entry into the fourth class was applied (printed record, 116, 122). This made Mims' monthly payments, after he entered the fourth class, \$3.60 up to, and \$4.50 after, August 1, 1888, and he was continuing to pay the latter amount at, and for years after, the grant of charter to plaintiff in error (printed record, p. 90), which by its terms enforced a carrying out of Mims' contract as it *then* existed (terms of charter elsewhere quoted).

Features of the amended by-law passed by defendant in 1910 and complained of, and which the Court has held to be a breach of the contract of defendant in error, are that such amendment not only raised the monthly rate of assessment to \$34.80 per month, but also provided that such payments should be in accordance with the member's "attained age and occupation" and amount of benefit certificate on January 1, 1911 (printed record, p. 100, top of page). And same further provided that the right to change, increase or adjust the schedules of rates, "is expressly reserved to the Supreme Lodge, as is also the right to apply any such changed, increased or adjusted schedule of rates to all of the member as of the date of their adoption without regard to the date of any member's certificate. This right of adjustment includes the right to advance members without reference to the plan or class of which they are members to their attained age at any time and apply new rates applicable thereto when deemed necessary by the Supreme Lodge to carry out the purposes of the Insurance Department" (printed record, 104). And said amended law further undertook to delegate away from the Supreme Lodge and to the "board of control" of the defendant all the power and authority necessary to carry the amendments into effect, the

delegating clause being "it is hereby intended to be the purpose and intent of the Supreme Lodge to invest the said board with every requisite power and all needful authority to carry into full effect the purposes of this section, and to do everything with respect thereto that the Supreme Lodge itself may or could do" (printed record, 103-104).

At page 11 of its brief plaintiff in error states that under the laws existing when its unincorporated society began acting as a Fraternal Insurance Company, and under which laws said unincorporated society acted and by which it was governed, and under the laws adopted by said unincorporated society during its existence, "express power was given to, and existed in, said unincorporated society, and its supreme governing body to change and amend its laws and to change and raise its rates of assessments". This is not true. Certainly not as applied to defendant in error's contract, as we have shown. "The contract of insurance entered into with the appellee did not stipulate that appellant should have the right to increase the rate of assessment against him" * * * (Court of Civil Appeals, finding of fact, printed record, p. 174, eleventh line). That any such express power was ever given or reserved to either corporation or to the unincorporated society, until the passage of the laws of 1910 forming the basis of this suit, is not admitted, but denied by defendant in error, and is dependent upon a correct construction of the several laws passed in the interim, but as all these laws (the first being in 1886) were passed after the execution of defendant in error's contract in 1885, we consider that it is not essential that we trace the record further on this point. *En passant*, the unincorporated society is not shown to have passed any laws. It carried on business under the laws of the old corporation, which existed at its expiration in 1890 (Court of Civil Appeals finding, printed record, p. 167, line 25).

At page 16 of appellant's brief it is stated that there was no evidence that defendant had assumed the benefit certificates sued upon except the section of defendant's charter as pleaded, and the further fact that defendant had received dues and assessments on said certificates, and the statement is made that there is no evidence that the unincorporated society, or the new corporation, received any assets from the old corporation, or in any manner assumed the debts of the old corporation, unless the fact that it received dues and assessments was evidence of such assumption, or any evidence that the defendant received any assets from either the old corporation or the unincorporated society.

These statements are not justified by the facts as will appear from the following undisputed facts and findings of the Court of Civil Appeals:

"The plaintiff upon the expiration of the charter of the old corporation in 1890, paid to the unincorporated society above referred to, from the year 1890 up to June, 1894, when defendant herein was incorporated, the dues upon the certificate made the basis of this suit, according to the laws under which such unincorporated society was transacting business, and after the defendant was incorporated, he paid to it dues and assessments required by it to be paid up to some time in 1910, but there seems to be no direct testimony that plaintiff knew of the unincorporated society or defendant, or had knowledge of the laws of either. The defendant was incorporated in 1894, as stated, by an act of the Congress of the United States, and then acquired and took over the membership, insurance business, and all assets of the said former corporation and unincorporated society." (Findings of fact, Court of Civil Appeals, printed record, p. 170, line 9.) * * * "The evidence is sufficient to show that the defendant, immediately upon its incorporation, took over and absorbed the membership and entire insurance business of the corporation which issued the policies, or con-

tract of insurance involved in this suit, and of the unincorporated society which succeeded it, and that continuously from the date of its incorporation in 1894 up to January, 1911, received and accepted from the appellee monthly payments of dues and assessments as a condition for carrying out his contract of insurance, and these facts render it responsible in law for a breach of said contract in the same way and to the same extent as if the contract had been issued in the first instance by it. Evidently defendant contemplated this when it applied for and obtained its charter. Beside we think the provision in defendant's charter which is set out in our statement of the facts obligated the defendant to perform the contract of insurance upon which appellee's suit is predicated, and made it liable in damages to appellee for a breach thereof." (Findings of fact, Court of Civil Appeals, printed record, p. 172, paragraph 2.)

Said provision in defendant's charter is:

"Section 3. That all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge, Knights of Pythias, mentioned in Section 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created" * * *. (Printed record, p. 95.)

Section 1 of said act was:

"Be it enacted by the Senate and House of Representatives of the United States, etc, that" (naming sundry persons residing in several states) "officers and members of the Supreme Lodge, Knights of Pythias, and their successors, be and they are hereby incorporated and made a body corporate and politic in the District of Columbia, by the name of 'The Supreme Lodge, Knights of Pythias,' etc." * * *. (Printed record, p. 94.)

That the purpose of the defendant in securing its charter was to take over the business and assume the obligations of the former corporation and of the unincorporated society,

which had been conducting the business since the expiration of the charter of the old corporation, is quite manifest from the following report of the committee as taken from the official journal of the defendant at its eighteenth convention in August and September, 1894 (printed record, pp. 93, 94).

"Incorporation of the Supreme Lodge.

"The special committee on incorporation of the Supreme Lodge (Journal, 1892, p. 6256) submitted the appended report, which was ordered to lie on the table and be printed:

"DOCUMENT 118.

"To the Supreme Lodge, Knights of Pythias:

"Your committee on incorporation, after careful examination of the facts and the law relative to the incorporation of the Supreme Lodge, found that the charter theretofore granted had expired by limitation of time, and being unanimously of the opinion that, considering the greatness of the Order and the magnitude of the business transacted by the Supreme Lodge, it was for the best interest of the Order that the "Supreme Lodge, Knights of Pythias" be legally incorporated, and believing it meet that this American Order be recognized by the Congress of the United States, prepared an act of incorporation, which was thereafter passed by the Congress of the United States and on the 29th day of June, approved, which said act as passed and approved is as follows:." (Here follows the act incorporating the defendant.)

The defendant's Supreme Secretary testified that when the defendant was incorporated it "took over the books and assumed the liabilities of the unincorporated society, but there were no funds on hand. I do not remember the exact sum, but there was practically nothing on hand. I think they were

in arrears at that time. The money had all been used in paying death losses from year to year. The money had been used in settling claims it had acquired up to that time. The corporation *did* take over the affairs of the unincorporated Knights of Pythias" (printed record, 162). Plaintiff in error has unintentionally added the word "not" to this last sentence, and made same to read "the corporation did *not* take over," etc. (p. 17, Brief of Plaintiff in Error and Answer to Motion to Dismiss Writ of Error).

POINTS AND AUTHORITIES.

I.

The charter of plaintiff in error as granted by the Congress, did not, expressly or impliedly, give it the right to raise the rate of assessment, or otherwise affect Mims' contract, as was attempted by the law passed by plaintiff in error in 1910, and complained of herein.

(See pages 16 *et seq.* Motion to Dismiss, or Affirm, for points and authorities not reproduced hereunder.)

The identical contentions urged by plaintiff in error, and the disposition of which necessarily determine whether any Federal question is involved in the instant case, are disposed of adversely to plaintiff in error in *Smythe v. this appellant*, 198 Federal, 967, by the United States District Court of the Northern District of New York (Ray, J.), and which case is affirmed by the Circuit Court of Appeals of the Second Circuit (La Combe, J.), 220 Federal, 438, which case is now pending on the docket of this Court. We fail to find any case which has more thoroughly reviewed the question. The following excerpts indicate what the Court holds:

"A general provision in the constitution of a fraternal order which insures the lives of its members that the constitution and general laws may be amended by a specified vote of the Supreme Lodge cannot be so construed as to authorize an amendment which materially increases the premiums or assessments to be paid by members under existing contracts, where no power to increase such rates is *specifically* reserved in the contracts." (Syllabus, 198 Fed. 968.)

"I have never supposed that when the legislature of a state enacts a law authorizing the incorporation of an Insurance Company and the right to alter, amend or repeal is expressly reserved in the act or by constitu-

tional provision, it may not do so, and, if the law under which the incorporation took place is amended so as to confer any powers and privileges I can see no objection to the corporation availing itself of the amendment. So long as fixed and vested rights are not interfered with, no member can complain of such action, and these cases in the Supreme Court of the United States not only recognize this principle, but are careful to point out that all contract rights were protected and preserved and that no existing contract was impaired. There is no suggestion in either case that such a corporation, even to preserve its existence, may increase the amount of the assessments to be paid by the assured and *definitely fixed by the contract of insurance* without his consent and exact same on the penalty of forfeiting his contract and all benefits earned and paid for" (198 Fed. 987).

The Circuit Court of Appeals in a brief two-page opinion affirms the District Court and approves its interpretation of the authorities and even adds:

"As to the effect on such a contract of the general provision that insured will be 'controlled by all the laws, rules and regulations governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge', it is unnecessary to add to Judge Ray's exhausted decision of the authorities. In *Ayres v. Ancient Order of Workmen*, 188 N. Y. 280, 80 N. E. 1020, the Court laid down the proposition that:

"'While a Mutual Benefit Fraternity, or Fraternal Insurance Society, may so amend its by-laws as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of the substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from State interference by Federal constitution'" (220 Fed. 441).

Wright v. Knights of the Maccabees of the World, decision by the Supreme Court, special term, Jefferson County, New York, reported in 95 N. Y. Sup. 996, and decision by the Court of Appeals reported in 89 N. E. 1078, holds that a corporate society has no authority under the general reserved right to amend its by-laws, to so amend same as to increase the individual rate of assessment against a member where the laws of the Order in force when such member joined provided a schedule of assessments graded according to age, fixing the assessment at a specified amount per month and providing that "*he should pay the same rate of assessment thereafter so long as he remains continually in good standing in the order*". The Court's (Court of Appeals) language in part is:

"While it was specifically provided that he should 'pay the same rate of assessment thereafter', the rate of assessment is now more than double. The benefits were specified and the rate was specified, and can such a contract of insurance be so amended by an insurer under the general power, as to take away from the insured, without his consent, part of what he specifically contracted for? * * * The general reservation doubtless authorized the defendant to amend its by-laws so as to cover subjects *not therein specifically provided for*, and even in other respects which would not essentially impair the contract made. But the subjects of assessments and benefits were specifically provided for, each being defined in express terms so that the member knew what he was bound to pay and what he was entitled to receive. * * * While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is be-

yond the power of the legislature as well as the association, for the obligation of every contract is protected from State interference by the Federal constitution."

Wright v. Knights of Maccabees of the World, 89 N. E. 1078.

And, for like reason, the Massachusetts Supreme Judicial Court refuses to follow *Reynolds v. Supreme Council*, 192 Mass. 150, where the contract (as in the case at bar) expressly provides that the rate of assessment shall remain level. Where the policy provided that "in no event shall the assured be required to pay an amount exceeding the rates contained in the table on the back of the policy", it is held that such is the maximum rate which may be charged and that there may be no raise in the rate.

Rosenfield v. Boston Mutual Life Insurance Co., 110 N. E. 305.

The right of future control reserved to a municipality in a street railway franchise as respecting the "construction, maintenance and operation" of the line of a street railway company does not include the power to reduce fares below the rate prescribed in an existing contract between the municipality and the company, but such provision has reference only to the manner of carrying on the business of the road, the laying of its tracks, the use of its streets, the keeping up of the equipment, the safety of the passengers and the public, and similar matters not involving the right to charge fares.

City of Minneapolis v. Minneapolis Street Railway, 215 U. S. 417.

In *City of Detroit v. Detroit Citizens Street Railway Company* this Court held that a reservation in an ordinance granting a street railway franchise, of the right from time to time to make such further rules, orders or regulations as to the

common council may seem proper, did not include the right on the part of the city at its own pleasure to reduce the fare agreed upon in such ordinance.

"The right from time to time to make such further rules, orders or regulations as the common council may deem proper cannot be held to extend to the alteration of the contract as to the rate of fare which shall be charged for the transportation of passengers. We think that this reservation permitted the city to make further rules or regulations than those contained in the ordinance, in regard, etc."

City of Detroit v. Detroit, etc., Ry. Co., 184 U. S. 367.

Clearly, then, the reserved power of amending by-laws, as given in defendant's charter, did not imply that the corporation would in this manner be given the right to unmake the very contract which the preceding section of the charter had been so zealous to protect and guard, and manifestly the lower Court has correctly applied the law herein by saying:

"It must be held that the laws and amendments passed after appellee's contract was entered into were prospective in their operation and should not be given a retroactive effect; that the reservation by appellant of the general power to amend its constitution and by-laws, and the provision in appellee's certificates which we have referred to relate only to the member's duties and obligations as such and do not authorize a radical change in the terms of his insurance contract, as was attempted to be made by the raised assessments." (Printed record, pp. 176, 177.)

"Every corporation has the right to make and change its by-laws in a manner not inconsistent with law, but such right does not give it the power to change its written contract, or impose upon a party contracting with it obligations which were never assumed." (Printed record, p. 175.)

A *fortiori*, where defendant's charter expressly required it to carry out according to its terms the contract of the former corporation or association, which contract itself contained terms expressly prohibitory of attempts at alteration.

The inhibition in defendant's charter as to having a constitution with power to amend same being that such constitution or amendments must "not conflict with the laws of the United States or of any State", the amended by-laws complained of are inoperative, not only because they conflict with the common law of the State of Texas, as announced in the instant case and in prior Texas cases which same follows (*Ericson v. Supreme Ruling*, etc., 105 Tex. 170), but such amended laws are likewise of no effect because in conflict with the Fifth Amendment and with Article I, Section 19, Texas Constitution, which reads:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised except by due course of the law of the land."

And perhaps in conflict with Article I, Section 16, Texas Constitution, which reads:

"No bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made."

"There is a power in this charter to alter, amend, add to or repeal, at pleasure, by-laws before made. It is argued from this that it was in the power of the corporate body, in due form and manner, to alter the by-law which had fixed the amount of the capital stock, and the number and relative value of the shares thereof. The power to make by-laws is to make such as are not inconsistent with the constitution and the law; and the power to alter has the same limit, so that no alteration could be made which would infringe the rights already given and

secured by the contract of the corporation. Nor was the power to alter, to the extent of affecting the contracted relative value of a share, reserved when the share was sold to the stockholder, so as to enter into and form a part of the contract. An alteration is a *pro tanto* repeal; but no private corporation can repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law then repealed."

Kent v. Quicksilver Min. Co., 78 N. Y. 159.

Parish v. Produce Exchange, 169 N. Y. 34.

The right given in defendant's charter to "have a constitution and shall have power to amend same at pleasure, provided that such constitution and amendments thereof do not conflict with the laws of the United States or of any State" is certainly no greater than the right usually reserved to a state to amend or alter a charter granted by it, and the authorities are to the effect that such reserved "power of alteration and amendment is not without limit; that alterations must be reasonable and consistent with the scope and object of the act of incorporation"; that "a right reserved by the general statutes to amend or repeal privileges and franchises conferred by the charter is one thing, but the power to take from the stockholders or others, rights or property interests acquired or vested before such repeal or amendment, is another and quite a different thing. The first comes within the legislative authority; the second lies beyond the limits of such authority, because the legislature cannot defeat or impair rights previously vested, which have sprung up or grown out of such corporate privileges or franchises, while the corporation was allowed to exercise the same".

Shields v. Ohio, 95 U. S. 319.

Hill v. Glasgow R. Co., 41 Fed. 610.

Greenwood v. Union Freight, 105 U. S. 13.

"Under this reserved power legislatures can only effect future contracts; they can in nowise change or alter corporate contracts already entered into, so as to affect the rights of parties already acquired."

Bank v. McVeigh, 20 Gratt (Va.) 457.

A general power reserved either by statute or by the constitution of a society, to amend its by-laws, does not authorize an amendment impairing vested rights of the members; the reserved right to amend "*is not intended to cover the case of existing members, and was applicable solely to those who should join the order after amendments*".

Beach v. Supreme Tent, Knights of Maccabees, 69 N. E. 282.

A by-law must be reasonable. "This rule of reasonableness forbids any *retroactive efficacy in abrogation of subsisting contract rights*; and the articles of association and by-laws existing at the time of acquisition of membership are in many respects to be regarded as establishing between the association and every member, and among themselves, such rights of a fundamental character."

Thompson on Corporations, 2nd Ed., Sec. 999.

"The function of a by-law is to prescribe the rights and duties of the members with reference to the *internal government* of the corporation, the management of its affairs and the rights and duties existing between the members *inter se*." "The proper office of by-laws is to regulate the incidental business of a corporation. *They should not affect rights of property or create obligations unknown to the law.*"

1 Thompson on Corporations, 2nd Ed., Sec. 975.

The very fact alone that the new law undertook to apply the rate in accordance with the attained age "*and occupation*" of the member was a breach of the contract.

Ayres v. Ancient Order of United Workmen, 188 N. Y. 280.

As likewise was the attempt of the Supreme Lodge to delegate its functions to the board of control as has been expressly decided to be without effect in numerous cases against this self-same plaintiff in error.

Supreme Lodge, K. of P. v. McLennan (Ill.), 49 N. E. 531.

Supreme Lodge, K. of P. v. Stein (Miss.), 21 So. 559.

II.

We do not understand that this Court is concerned on this appeal with the point, but should we be mistaken in this then we make reference to the following cases, all of which hold that the right to decrease the financial value of the benefit certificate does not exist under the general agreement of the member as, for instance, to "be governed by all the laws of the order now in force or hereafter to be enacted".

Supreme Lodge, K. of P. v. Weller (Va.), 25 S. E. 891.

Richter v. Sup. Lodge, K. of P. (Cal.), 69 Pac. 483.

(The two cases just cited hold that the member's agreement to be governed by the laws of the *old* corporation in no manner bound him to laws passed by the *new* corporation.)

Pearson v. Knight Templars (Mo.), 89 S. W. 588.

Morton v. Supreme Council (Mo.), 73 S. W. 259.

Indemnity Co. v. Jarman, 104 Fed. 638.

Dowdall v. Supreme Council of Catholic Mutual, etc., 89 N. E. 1075.

Evans v. Southern Tier Masonic Relief Ass'n, 189 N. Y. 453.

Ericson v. Supreme Ruling, etc., 105 Tex. 170.

Green v. Royal Arcanan, 296 N. Y. 591.

Smythe v. Supreme Lodge, K. of P., 198 Fed. 967, 220 Fed. 438 (now pending in this Court).

Gaut v. Supreme Council (Tenn.), 64 S. W. 1074.

We earnestly ask that the case be dismissed or affirmed, but in either event (*Deming v. Carlisle*, 226 U. S. 102) with damages for delay and double costs, as sought in our motion to dismiss or affirm.

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SUPREME LODGE, KNIGHTS OF PYTHIAS *v.*
MIMS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 345. Argued May 1, 2, 1916.—Decided June 12, 1916.

Where the case necessarily turns on the construction of act of Congress, which is the charter of one of the parties, a Federal question is presented, and this court has jurisdiction under § 237, Jud.

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Code, if the construction contended for by plaintiff in error was rejected by the court below.

Under § 4 of the Act of June 29, 1894, constituting the charter of the Knights of Pythias, giving a right to have by-laws and to amend the same, the corporation had power to raise rates for life benefits to such point as was necessary for it to go, and a member continuing to remain therein was obligated to pay the assessments fixed by the laws as amended.

THE facts, which involve the construction of the charter granted by act of Congress to the Knights of Pythias and the rights and obligations of a holder of its insurance certificates, are stated in the opinion.

Mr. M. M. Crane, with whom *Mr. H. P. Brown*, *Mr. Edwin Crane*, *Mr. James P. Goodrich*, *Mr. Ward H. Watson*, *Mr. James E. Watson* and *Mr. Sol. H. Esarey* were on the brief, for plaintiff in error.

Mr. Lawrence C. McBride, with whom *Mr. Joseph E. Cockrell*, *Mr. Thomas F. West* and *Mr. Edward Gray* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit against a corporation chartered by Congress on June 29, 1894 (c. 119; 28 Stat. 96), to recover all sums paid by the plaintiff, the defendant in error, to the defendant and its predecessors; the ground alleged being that the defendant, the plaintiff in error, has demanded monthly dues in excess of its rights and thereby has entitled the plaintiff to recover all that he had paid, with interest.

The facts are as follows: The plaintiff originally took out two certificates of insurance from an earlier corporation of the same name, the charter of which expired on

August 5, 1890. In May, 1885, he surrendered these certificates and took out a new one in what was called the Fourth Class by which, in consideration of his original declarations and representations and of the payment "of all monthly payments as required, and the full compliance with all the laws governing this Rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws" the sum of \$3,000 was to be paid to the plaintiff's wife, or such other beneficiary as he might direct in proper form, upon notice and proof of death and good standing at the time; provided, as hereafter stated. It was further stipulated that any violation of the conditions mentioned or the requirements of the laws governing this Rank should avoid all claims. By the certificate of incorporation the corporation had power 'to alter and amend its Constitution and By-laws at will'; the laws of 1880, then in force, provided that 'these laws [regulating assessments *inter alia*,] may be altered or amended at any regular session of the Supreme Lodge K. of P.'; and by his original application the plaintiff agreed to conform to the laws and regulations of the order then in force or that might thereafter be enacted, or submit to the penalties therein contained.

The plaintiff contends that his contract took him out of these reiterated provisions for possible change; and his ground is that by Article V, § 4, of the laws of 1884, creating the Fourth Class, the endowment fund for the payment of benefits in that class was to be derived from monthly payments from each member for each one thousand dollars of endowment, to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to be taken at the nearest birthday, "Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues." A table appended gave the rate for the different ages from

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21 to 60. At that time members were transferred to the Fourth Class at the original entry age, which in the plaintiff's case was 42. These same laws of 1884 repeated the former provision as to amendment by the Supreme Lodge, now requiring a two-thirds vote. The recension of 1886 repeated the last-mentioned provision and set forth a form of application by which the applicant agreed not only, as heretofore, that he, but also that 'this contract shall be controlled' by the laws then in force or that might be enacted thereafter. The power to alter was applied in 1888 to the payments to be made by the Fourth Class. The Board of Control was ordered to rerate members transferred to the Fourth Class as the plaintiff was, so that thereafter they should pay as of the age at which they were transferred instead of that at which they first became members. Thereafter the plaintiff paid as of the age of 48.

After the charter expired in 1890 the business was kept going under the same name by a voluntary association, the plaintiff paying his assessments as before, until on June 29, 1894, the act of Congress mentioned incorporated certain persons named, 'officers and members of the Supreme Lodge, Knights of Pythias' by the name of 'The Supreme Lodge Knights of Pythias' and authorized them to use the powers 'incidental to fraternal and benevolent corporations within the District of Columbia.' By the third section of the charter "all claims, accounts, debts, things in action or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in § 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time." This is the main ground upon which the defendant is

sought to be charged with the certificate issued by the former corporation. By § 4 "said corporation shall have a constitution, and shall have power to amend the same at pleasure; *provided*, that such constitution or amendments thereof do not conflict with the laws of the United States or of any State." Amendments to the laws of the association were adopted this same year, 1894, by one of which the existing rates were retained and it was provided that each member of the endowment rank should continue to pay the same amount each month thereafter so long as he remained a member, 'unless otherwise provided for by the Supreme Lodge or Board of Control of the endowment rank.' A similar provision was made in 1900, but the rate for the age of 48 was made \$2.45 or \$7.35 for the \$3,000 in the certificate. The plaintiff paid the rates as established from time to time.

The split came in 1910. In that year the corporation passed a law providing for a rerating of every member of the Fourth Class on January 11, 1911, in accordance with his attained age and occupation, under which the plaintiff's monthly payment would be raised to \$34.80, unless he accepted one of several options offered to him. It should be added that his occupation played no part as it was not ranked as hazardous. He was notified, but declined to pay or otherwise accede to the change. On January 20, 1911, he tendered \$22.05 for the months of January, February and March of that year, the tender was refused and in May this suit was begun. The Court of Civil Appeals affirmed a judgment for the plaintiff on a verdict directed by the trial court, modifying it so far as to confine the recovery to payments made since the issue of the certificate of 1885, with interest. An application to the Supreme Court for a writ of error was refused.

There is a motion to dismiss but as the case necessarily will turn on the construction of the present charter, an act of Congress, and the defendant justifies under it, the

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motion is denied. *Creswill v. Knights of Pythias*, 225 U. S. 246, 258. There is no ground for treating the plaintiff as not having come into the new company by virtue of § 3. That section provided for his doing so and when he was treated and acted as a member the presumption is conclusive that he did so in pursuance of the law that authorized it.

We assume without argument that by § 3 of the charter and his assent thereto the plaintiff became a member of the organization with whatever rights he might have as such. It is not to be conceived however that the charter was intended to create a privileged class or that the right of the corporation to amend its laws was less in his case than in that of one joining after 1894. As to later members we can have no doubt, notwithstanding the difference of opinion in state courts, that the right to amend extends to a change in the rates to be paid. Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. Its charter expressly provides by § 5 that it 'shall not engage in any business for gain; the purposes of said corporation being fraternal and benevolent.' It is manifest therefore that it would be a perversion of its purposes, if through some ambiguity of phrase the necessary source of benefits were closed in favor of certain members while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other cause, either they must pay more or the beneficiary take less.

The same conditions applied to the original corporation, and the plaintiff testifies that he understood them. He says in so many words that he knew that the only source of revenue to meet his and other policies was from assessments of the insured, and that if, after a proper rate was fixed for a membership of five thousand, the membership fell to two thousand, the rate would have to be increased if the obligations were to be met. The statute and the words of the law of the company under which the plaintiff entered the Fourth Class should be construed in the light of these considerations. In determining his rights it is important to bear in mind that there was no specific promise to him like the promise to pay in the certificate but that his whole reliance is upon a law of the corporation, and that he had notice that all laws of the corporation were liable to be repealed. The only language in the certificate bearing on the matter pointed to possible changes, one condition being the payment of all monthly payments 'as required.' It was obvious and understood that to pay a benefit an increase in the assessment might be necessary. In our opinion the present charter like the first must be construed to authorize such an increase and the clause in the law of 1884 relied upon—that the payments should continue the same so long as the membership continued—was not a contract but was a regulation subject to the possibility inherent in the case. More than ambiguous words in an amendable law would be needed to establish a departure from the ground on which the relation of the parties obviously stood and to create a privilege that attacked the corporation in its very life. Compare the language in *Royal Arcanum v. Green*, 237 U. S. 531, 542, and the same case below, *sub. nom Reynolds v. Royal Arcanum*, 192 Massachusetts, 150, 157.

The persons incorporated in 1894 were described as officers and members of the Supreme Lodge then existing, that is, of a voluntary association, and it was the rights

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and duties of that association that the defendant assumed, if we are to take the words in their literal sense. We spend no time upon the inquiry what those rights and duties were, because, as we have said, we assume that the plaintiff acquired a standing in the new company. But in the second stage as in the first the law establishing the Fourth Class had received a practical construction as being open to change, by the continued rating of the plaintiff at 48 instead of 42 as at first, and although the plaintiff says in a general way that he protested, he paid, and he had notice of what the earlier companies asserted to be their rights when he came into the new one that asserted the same and put them in force as against him. We mention these details to show that the plaintiff suffers no injustice and meets with no surprise when we state our opinion that the assumption under § 3 of the new charter of a relation with the plaintiff that originally arose under a law of the old corporation was not the assumption of a contract for immutable assessments, and decide that the power to amend given by § 4 included the power to raise the rates to such point as was necessary for the corporation to go on.

The plaintiff's certificate did not absolutely promise to pay \$3,000 if the plaintiff had performed the conditions. It contained a proviso by which if one monthly payment by members holding an equal amount of endowment should not be sufficient to pay the sum, the amount of the monthly payment should be the benefit received. If all other Fourth Class certificates were in similar form it may be asked whether it was reasonable to increase the assessments rather than to allow the payments to abate. The answer in addition to what we already have said is that unless the corporation continued to make substantial payments at death it could not go on. On the evidence, at the end of 1910 the plaintiff's certificate was worth very little or nothing. It well may have been

thought better to rehabilitate the class rather than to allow their certificates to become waste paper. At all events that was the prevailing view in the republic to which the plaintiff belonged, and as we have said the charter authorized it to be enforced. It is unnecessary to discuss the options that were offered in the alternative, but it is proper to remember that for many years the plaintiff has been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived, he has to bear the burdens incident to the nature of the enterprise into which he went open eyed.

Judgment reversed.
